



राजपत्र, हिमाचल प्रदेश

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

मंगलवार, 28 मार्च, 2023 / 7 चैत्र 1945

हिमाचल प्रदेश सरकार

LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

Dated, the 24th January, 2023

No. Shram (A) 3-8/2021 (Awards) L.C. Shimla.—In exercise of the powers vested under section 17 (1) of the Industrial Disputes Act, 1947, the Governor, Himachal Pradesh is pleased to

order the publication of awards of the following cases announced by the Presiding Judge, Labour Court, Shimla on the website of the Printing & Stationery Department, Himachal Pradesh i.e. “e-Gazette” :—

Sl. No.	Ref. No.	Petitioner	Respondent	Date of Award/Order
1.	Ref. 87/2018	Ms. Rukmani Sharma	M/s LLR Group of Institute, Solan	01-11-2022
2.	Ref.138/2019	Mazdoor Sangh	Himachal Futuristic Communication Ltd.	01-11-2022
3.	Ref.141/2019	Mazdoor Sangh	Himachal Futuristic Communication Ltd.	01-11-2022
4.	Ref.124/2020	Sh. Ram Krishan	Himachal Futuristic Communication Ltd.	01-11-2022
5.	Ref.126/2020	Sh. Shiv Kumar	Himachal Futuristic Communication Ltd.	01-11-2022
6.	Ref.127/2020	Reena <i>Alias</i> Seema	Himachal Futuristic Communication Ltd.	01-11-2022
7.	Ref.128/2020	Ms. Anita	Himachal Futuristic Communication Ltd.	01-11-2022
8.	Ref.141/2020	Sh. Kanshi Ram	Himachal Futuristic Communication Ltd.	01- 11-2022
9.	Ref.142/2020	Sh. Pawan Kumar	Himachal Futuristic Communication Ltd.	01-11-2022
10.	Ref.143/2020	Sh. Chunni Lal	Himachal Futuristic Communication Ltd.	01-11-2022
11.	Ref.144/2020	Sh. Kamlesh Kumar	Himachal Futuristic Communication Ltd.	01-11-2022
12.	Ref.145/2020	Sh. Narender Kumar	Himachal Futuristic Communication Ltd.	01-11-2022
13.	Ref.146/2020	Sh. Dharam Pal	Himachal Futuristic Communication Ltd.	01-11-2022
14.	Ref.148/2020	Smt. Poonam Sharma	Himachal Futuristic Communication Ltd.	01-11-2022
15.	App. 28/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
16.	App. 29/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
17.	App. 30/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
18.	App.31/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
19.	App.32/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh, HFCL Ltd.	01-11-2022
20.	App.33/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh, HFCL Ltd.	01-11-2022

21.	App. 34/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
22.	App. 35/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh, HFCL Ltd.	01-11-2022
23.	App. 36/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh, HFCL Ltd.	01-11-2022
24.	App. 37/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
25.	App. 38/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
26.	App. 39/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
27.	App. 40/2020	Himachal Futuristic Communication Ltd.	Mazdoor Sangh , HFCL Ltd.	01-11-2022
28.	App. 73/2020	Sh. Anoop Kumar	Himachal Futuristic Communication Ltd.	
29.	App. 74/2020	Sh. Narinder Kumar	Himachal Futuristic Communication Ltd.	01-11-2022
30.	App. 75/2020	Sh. Moti Ram	Himachal Futuristic Communication Ltd.	01-11-2022
31.	App. 76/2020	Sh. Prem Chand	Himachal Futuristic Communication Ltd.	01-11-2022
32.	App. 77/2020	Sh. Harvinder Singh	Himachal Futuristic Communication Ltd.	01-11-2022
33.	App. 78/2020	Sh. Krishan Lal Thakur	Himachal Futuristic Communication Ltd.	01-11 -2022
34.	App. 79/2020	Sh. Ramesh Dutt	Himachal Futuristic Communication Ltd.	01-11-2022
35.	App. 80/2020	Ms. Pushpa Kumari	Himachal Futuristic Communication Ltd.	01-11-2022
36.	App. 81/2020	Sh. Man Singh	Himachal Futuristic Communication Ltd.	01-11-2022
37.	App. 82/2020	Sh. Yog Raj	Himachal Futuristic Communication Ltd	01-11-2022
38.	App. 83/2020	Sh. Anuj Jamwal	Himachal Futuristic Communication Ltd	01-11-2022
39.	App. 84/2020	Sh. Ram Krishan	Himachal Futuristic Communication Ltd.	01-11-2022
40.	App. 85/2020	Sh. Pawan Kumar	Himachal Futuristic Communication Ltd.	01-11-2022
41.	App. 90/2019	Sh. Sukhvinder Singh	Factory Manager, Ind Sphinx Precision	01-11-2022
42.	App. 91/2019	Sh. Ranjeet	Factory Manager, Ind Sphinx Precision	01-11-2022
43.	App.92/2019	Sh. Mukesh Kumar	Factory Manager, Ind Sphinx Precision	01-11-2022

44.	App. 98/2019	Sh. Shiv Shankar	Factory Manager, Ind Sphinx Precision	01-11-2022
45.	App. 99/2019	Sh. Anil Kumar	Factory Manager, Ind Sphinx Precision	01-11-2022
46.	App.100/2019	Sh. Ravinder Kumar	Factory Manager, Ind Sphinx Precision	01-11-2022
47.	App. 69/2021	Sh. Rajesh Chand	Factory Manager, Ind Sphinx Precision	01-11-2022
48.	App. 70/2021	Sh. Vijay Kumar	Factory Manager, Ind Sphinx Precision	01-11-2022
49.	App. 71/2021	Sh. Ajay Kumar	Factory Manager, Ind Sphinx Precision	01-11-2022
50.	App. 13/2021	Sh. Sudesh Kumar	Factory Manager, Ind Sphinx Precision	01-11-2022
51.	App.14/2021	Sh. Rajat Sharma	Factory Manager, Ind Sphinx Precision	01-11-2022
52.	App.15/2021	Sh. Laxman Dutt	Factory Manager, Ind Sphinx Precision	01-11-2022
53.	Ref. 118/2018	Sh. Naresh Kumar	St. Bedes College .	27-11-2022
54.	Ref. 62/2017	STP Workers Union	Engineer-in-Chief IPH Shimla & Ors.	27-11-2022
55.	Ref. 164/2018	STP Workers Union	Engineer-in-Chief M.C. Shimla & Ors.	27-11-2022

By order,

AKSHAY SOOD,
Secretary (Lab. & Emp.).

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 87 of 2018

Instituted on : 04-01-2016

Decided on : 01-11-2022

Rukmani Sharma, r/o Sai Apartment, Block-E, 3rd Floor, House No. 317, Near Flora Hotel,
Bye-Pass, Saproon, Tehsil & District Solan, H.P. . .Petitioner.

Versus

1. M/s LR Group of Institute, Vill. Jabli-Kyar, P.O. Oachghat, Tehsil and District Solan,
H.P. through its Chairman. . .Respondent.

Reference petition under section 10 of the Industrial Disputes Act, 1947

For the Petitioner : Shri J.C Bhardwaj, AR

For the Respondent : Shri Navesk Kumar, Adv.

AWARD

The present reference petition has been, received from the Appropriate Government, vide notification dated 28.02.2018, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether action of the management of M/s L.R. Group of Institutes, Village Jabli-Kyar, P.O. Oachghat, Tehsil & District Solan, not to allow Ms. Rukmani Sharma, r/o Sai Apartment, Block-E, 3rd Floor, House No. 317, Near Flora Hotel, Bye-Pass, Saproon, Tehsil & Distt. Solan, H.P. to resume her duty during December, 2015, is legal and justified? If not, what relief including reinstatement, amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above management?”

2. Material facts necessary for the disposal of the present claim petition are thus that the petitioner was initially engaged as Lab Assistant on 13.07.2009 and her services were regularized in view of her diligence and continued, as such with the respondent institution and performed duties with sincerity and honesty till 02.12.2015, on which date her service were terminated illegally. The last drawn salary of the petitioner was ₹13,600/-. The termination of the service of the petitioner is in violation of Sections 25-B and 25-F of the Act as neither the petitioner was served with any show cause notice nor any inquiry was ever held in accordance with law, by following principles of natural justice and thus no opportunity of being heard were afforded to her. The petitioner has completed 240 working days in a calendar year. After the oral termination of the services of the petitioner, the respondent has retained her juniors in service and also engaged fresh hands where her services had been terminated without any reason, which is also in violation of Sections 25-G and 25-H of the Act.

3. In the footnote of the petition, the following prayer clause has been appended, which reads as under:

“Now it is, therefore, prayed that your honour may kindly be pleased to declare the termination of the petitioner as illegal and unjustified and award the reinstatement to the petitioner/workman by declaring the termination null, void and inoperative by the respondent on 02.12.2015 from the service, with full back wages, seniority and other consequential service benefits throughout with costs.”

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections maintainability, petition is bad for non-joinder of necessary party, not approached the court with clean hands, no cause of action and no locus standi.

5. On merits, it is denied that the service of the petitioner were terminated by the respondent on 02.12.2015. It is further denied that the petitioner was illegally restrained from attending her duties. It is submitted that the appointment of the petitioner was purely on contractual/temporary basis, hence, the question of termination does not arise at all. The petitioner had left the job with her consent without giving prior one month's notice to the respondent. The retaining of junior persons in the same establishment has also been denied by the respondent. It is

further submitted that the petitioner and other workmen in connivance with office bearers of the workers union went on illegal strike *w.e.f.* 30.11.2015 and thereafter the petitioner did not come back and joined her duties despite requested by the respondent. It is also denied that the petitioner is unemployed. The respondent prayed for the dismissal of the claim petition.

6. While filing rejoinder, the petitioner controverted the averments made thereto in the reply filed by respondent by reaffirming and reiterating those averred in the claim petition.

7. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, *vide* Court order dated 10.09.2021, as under:

1. Whether the action of the management not to allow the petitioner to resume her duty during December, 2015, is illegal and unjustified? . . .*OPP.*
2. If issue no.1 is proved in affirmative, to what relief the petitioner is entitled? . . .*OPP.*
3. Whether the petition is not maintainable in the present form? . . .*OPR.*
4. Whether the petition is bad for non-joinder of necessary party, as alleged? . . .*OPR.*
5. Relief

8. For the reasons to be recorded hereinafter while discussing issues for determination, my findings their own are as under:

Issue No.1	Yes
Issue No. 2	Entitled to re-instatement with seniority and continuity but without back-wages.
Issue No. 3	No
Issue No. 4	No
Relief	Reference is partly answered in affirmative as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO. 1 to 2

9. Both these issues are intrinsically connected and mutually existed and required the common appreciation of evidence, hence taken up together for the purpose of discussion.

10. The petitioner namely Smt. Rukmani Sharma appeared into the witness dock as (PW-1) to depose that she joined the respondent as Lab Assistant on 13.07.2009 vide appointment letter (P-1) and she was given an increment in the year September 2012 vide letter (P-2). She remained with the respondent till 02.12.2015. She was orally terminated from service without giving any notice, show cause notice and retrenchment compensation. She worked continuously for 240 days in each calendar year. No domestic enquiry had been conducted against her and she is not gainfully employed.

11. In cross-examination, she denied that she was not contractual basis. Volunteered that she was regular employee. She admitted that she was getting salary of ₹8000/- per month. She denied that she abandoned her job on her own will. She denied that she joined the illegal strike with the workers union on 30.11.2015. She further denied that she did not join her services even after calling by respondent. She denied to have admitted before the Labour Officer, Solan that she had left the job.

12. On the other hand, the respondent has examined one Shri Adil Hussain, Manager HR of the respondent as (RW-1), who tendered into evidence his sworn-in affidavit (RW-1/A), wherein he reiterated almost all the averments as made thereto in the reply filed on behalf of respondent. He also tendered into evidence, authority letter (RW1/B).

13. In the cross-examination he admitted that neither any notice has been issued to resume duties nor any show cause notice or chargesheet was served. According to him, the petitioner went on illegal strike and did not resume her duties. He admitted that the petitioner was engaged on contract basis. He denied that the petitioner was posted in the Lab where all the subjects *i.e* mechanical, civil, IT, Computer Science etc. were covered. He denied that the petitioner was not allowed to resume her duties. He denied to be deposing falsely.

14. Shri J.C. Bhardwaj, AR for the petitioner contended with vehemence that the services of the petitioner have been terminated by the respondent in violation of the provisions of section 25-F of the Act as before terminating her services neither any notice as served upon her nor she was paid retrenchment compensation. He further contended that the respondent had retained the services of the junior persons and after the termination of the services of the petitioner, the respondent had engaged fresh hands in clear cut violation of the provisions of sections 25-G and 25-H of the Act. He prayed that the services of the petitioner may kindly be reinstated with all consequential service benefits including full back-wages.

15. On the contrary, Shri Navesh Kumar, Ld. Counsel appearing on behalf of the respondent has strenuously argued that the services of the petitioner have never been terminated by the respondent as she abandoned the job on her own sweet will. The petitioner failed to resume her duties despite request. Hence, she is not entitled for the protection of section 25-F of the Act. He further argued that the petitioner is not a workman and the respondent institute is not covered under the Act. He prayed for the dismissal of the claim petition.

16. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

17. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play, in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be

express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or**
- (ii) who is employed in the police service or as an officer or other employee of a prison; or**
- (iii) who is employed mainly in a managerial or administrative capacity; or**
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature[”**

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;**
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;**
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”**
- (c) termination of the service of a workman on the ground of continued ill-health”**

18. The learned counsel appearing on behalf of the respondent contended that the present claim petition is not maintainable as the respondent institute being an educational institution does not fall within the ambit of the Act.

19. On the other hand, the learned AR appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “*workman*” under the Act and that the educational institutions are an industry in terms of Section 2(j) of the Act.

20. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of **H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737**, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four

categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in *May & Baker*, *WIMCO* and *Bunnah Shell* cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

21. The issue whether an educational institution is an “industry”, and its employees are “workmen” for the purpose of the Act has been answered by a Seven Judge Bench of the Hon’ble Supreme Court way back in the year 1978 in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held that educational institution is an industry in terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations.”

22. A perusal of the above mentioned two judgments of the Hon’ble Supreme Court clearly show that the definition of “workman” as given in Section 2(s) of the Act has been interpreted in the most wide terms. Even otherwise the import of the provisions itself is wide ranging. It has been defined in such a way to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a “workman” atleast for the purposes of this Act. Even if

a person is working on contract it cannot be said that he does not fall within the definition of a “workman”. It could be that being a contractual employee his disengagement may not fall within the definition of “retrenchment” but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of “workman”. So, a contractual labourer/field assistant employed by a university, being an unskilled person, is a workman for the purpose of the Act.

23. Now, advertent to the question regarding the termination/ dismissal of the petitioner. It is a simplicitor case of the respondent that the petitioner had abandoned the job on her own sweet will as she did not join back her duties despite repeated requests. The respondent did not place on records any cogent documentary proof to this effect.

24. Admittedly, it is not disputed that the petitioner worked as a Lab Assistant with the respondent from July 2009 to December 2015. It is also not in dispute that prior to the same the services of the petitioner have been regularized. It is also not in dispute that the petitioner had rendered continuous job as per Section 25-B. It is also not in dispute that neither any show cause notice nor retrenchment compensation was served/paid to the petitioner.

25. In the instant case, the petitioner as per her pleading and evidence on record testified on oath that she was relieved from his duty by the respondent on 02.12.2015. It is not in dispute that the petitioner was not allowed to join back her duties. It is satisfactorily admitted by the respondent witness (RW1) that neither any notice has been issued to the petitioner to resume her duties nor show cause notice, charge sheet etc. were issued. No proof to the illegal strike was placed on record. Admittedly, initially the petitioner was on contractual basis and the terms of contractual employment of the petitioner was thereafter regularized the respondent. As already mentioned, it is admitted case of the respondent that she was relieved from her duty by the respondent on 02.12.2015. The only plea which has been taken by the respondent is to this effect that despite requests, the petitioner failed to resume her duties. From the record, it is quite clear that before not allowing the petitioner to resume her duties, neither she had been issued any notice nor paid retrenchment compensation. Although, the plea, taken by the respondent, is to this effect that the petitioner had abandoned her job but there is no such material which could go to show that any notice had been issued to her for resuming her duties. **It has been held by the Hon’ble Apex Court in 2001 LLR 54, M/s Scooters India Ltd., Vs. M. Mohammad Yaqub that: “When a workman fails to report for duties, the management cannot presume that the workman has left the job despite being called upon to report failing which his name will be removed from the rolls.” It was further held that : “ The principles of natural justice were required to be followed by giving opportunity to the workman.** Para 12 is relevant and is reproduced as under:

“The question which then arises is whether the principles of natural justice were followed in this case. As has been set out herein above Mr. Swroop had submitted that the workman had been given an opportunity to join the duty and that he did not join duty even though repeatedly called upon to do so. It is contended that principles of natural justice have been complied with in this case. However, the material on record indicates otherwise. The Labour Court in its award sets out and accepts the respondent’s case that he had not been allowed to join duty. The respondent has given evidence that even though he personally met Chief Personnel Officer, he was still not allowed to enter the premises. The evidence is that inspite of slip Ex. W.2, he was prevented from joining duty when he attempted to join duty. The slip Ex. W.2 had been signed by the Security Inspector of the appellant. This showed that the respondent had reported for work. As against this evidence, the appellant has not led any evidence to show that the workman had not report for duty. Even, though the slip

Ex. W.2 had been proved by the workman, the Security Inspector, one Mr. Shukla was not examined by the appellant. Further the evidence of the senior Time Keeper of the appellant established that the appellant had worked for more than 240 days within period of 12 calendar months immediately preceding the date of termination of service. This was proved by a joint inspector report, which was marked as Ext. 45/A. It was on the basis of this material and the evidence that the Labour Court came to the conclusion that there was retrenchment without flowing the provisions of law. As the workman was not allowed to join duty, Standing Orders 9.3.12 could not have been used for terminating his services.”

26. Thus, having regard to the law laid down by the Hon’ble Apex Court (supra) as well as evidence, on record, I have no hesitation in holding that the petitioner had not abandoned the job on her own sweet will.

27. The next very question which arises for determination is that whether the termination of the services of the petitioner is violative of the provisions of the Act. From the evidence available on record, it is abundantly clear that initially the services of the petitioner have been engaged on contract basis and thereafter her services have been regularized by the respondent. It is also proved on record that the petitioner had worked continuously from 13.07.2009 to 02.12.2015 and had completed 240 working days in each twelve calendar months. It is admitted position on record that neither any notice as required under section 25-F of the Act, was served upon the petitioner before terminating her services. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

28. So, in view of this enabling provision of the Act, no workman employed in any institute, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be**

interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case.”

29. The petitioner had worked continuously with the respondent and had completed 240 days in preceding 12 months before her termination. Therefore, it was incumbent upon the respondent to have conducted the enquiry against the petitioner prior to her termination. However, no enquiry was held before terminating her services. Hence, the termination of the services of the petitioner without conducting any enquiry and without affording reasonable opportunity of being heard to the petitioner is in utter violation of the principles of natural justice. It is also clear from the record that neither any notice as prescribed under section 25-F of the Act was served upon the petitioner nor she was paid any compensation in lieu thereof. Therefore, before terminating the services of the petitioner, it was incumbent upon the respondent to have complied with the provisions of section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case, the perusal of the record shows that the respondent has failed to comply with the provisions of section 25-F of the Act. **In (2015) 4 SCC 544, Mackinnon Mackenzie and Company Ltd., Vs. Mackinnon employees Union**, the Hon'ble Apex Court has held as under:

“34. The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law.”

30. In the instant case also as observed aforesaid, the petitioner completed more than 240 days during the period of twelve calendar months in the preceding year from the date of her retrenchment, her services could not have been terminated unless she was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

31. In the back-drop of aforesaid events, it is held that the action of the respondent management not to allow the petitioner to resume her duties during December 2015 is in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified. The petitioner is held entitled for

32. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned AR for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza**, the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla** that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

33. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that she was not gainfully employed after the dismissal of her services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C. Sharma** that :

“16.When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim.”

34. In the present case there is no satisfactory evidence on record to suggest that the petitioner was not gainfully employed after her termination. The petitioner has failed to discharge her burden by placing any concrete material on record that she was not gainfully employed after her termination. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages.

Issues No. 3 & 4

35. Both these issues are intrinsically connected and mutually existed and required the common appreciation of evidence, hence taken up together for the purpose of discussion.

36. In support of these issues, no specific evidence has been led by the respondent which could go to show as to how the present petition is not maintainable and is bad of non-joinder of necessary party especially when the petitioner has filed the present petition pursuant to the reference petition received from the appropriate government for its legal adjudication and I find nothing wrong with the present petition which is perfectly maintainable. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

RELIEF

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby partly allowed. **The petitioner is ordered to be reinstated in service forthwith with seniority and continuity from the date of her illegal retrenchment. However the petitioner is not entitled to back wages.** The reference stands answered in favour of the petitioner and against the respondent. Let a copy of this order/award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court on today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 138 of 2019
Instituted on : 08-01-2021
Decided on : 01-11-2022

The General Secretary, Himachal Futuristic Communications Ltd. Group Mazdoor Sangh,
(Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P.
.Petitioner.

Versus

The Factory Manager, M/s Himachal Futuristic Communications Ltd. Electronics Complex,
Chambaghat, Solan, Tehsil & District Solan, H.P.
.Respondent.

Reference under section 10 of the Industrial Disputes Act, 1947

For Petitioner : Shri J. C. Bhardwaj, AR
For Respondent : Shri Vikas Chauhan, Advocate

AWARD

The following reference petition has been, received from the Appropriate Government *vide* notification dated 17.09.2020, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication, which reads as under:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

2. Material facts necessary for the disposal of the present claim petition are thus that the petitioner union is the registered union under Trade Union Act, which was duly authorized by the workers working in the respondent management by way of resolution and authority letter to five and maintain the present claim to the demand notice under Section 2K of the Act received from the

appropriate government for its real adjudication. The respondent management resorted to unfair labour practices and suspended three office bearers of the workers union and 10 executive members during the pendency of the demand notice dated 29.03.2019. In order to built the pressure upon the trade activist, the management victimized these workmen and transferred them at faraway places by issuing transfer orders which were unlawful, illegal, null and void and in operative.

3. The demand charter under section 2K of the Act was raised by the workers union by raising 16 demands. To which the respondent management did not agreed to settle the matter by following the principles of collective bargaining. Each and every demand contended in demand charter dated 29.03.2019, are reproduced, as under:—

1. श्रमिकों के वेतनमानों में प्रतिवर्ष 25 प्रतिशत की वृद्धि की जाए
2. वेतनमानों में उत्पन्न की गई विसंगतियों को दूर किया जाए
3. सेवाकाल के दौरान प्रबन्धकों की अनुमति से सम्बन्धित कार्य के विषयों में उच्च शिक्षा प्राप्त कर चुके श्रमिकों को लाभ देने के लिए एक नीति बनाई जाए।
4. पदोन्नति नीति को पुनर्निर्धारित किया जाए
5. श्रमिकों को दिए जाने वाले ऋण की सीमा बढ़ाई जाए व उसकी प्रक्रिया को सरल बनाया जाए व अन्य आवश्यक बदलाव किए जाएं।
6. कैंटीन के उत्पादों में 50 प्रतिशत का अनुदान दिया जाए और वहां आवश्यक सुविधाएँ प्रदान की जाए। वहां एक फ्रिज स्थापित किया जाए। चाय की गुणवत्ता में सुधार करते हुए मशीनों को हटाकर परम्परागत तरीके से चाय बनाई जाए।
7. यूनियन कार्यालय की मुरम्मत की जाए व उसमें आवश्यक सुविधाएँ उपलब्ध करवाई जाए
8. ठेकेदार के माध्यम से कार्यरत श्रमिकों को वेतन वृद्धि, छुट्टियां, बोनस, गेटपास इत्यादि वो सभी लाभ व सुविधाएँ दी जाएं जो अन्य श्रमिकों को दिए जाते हैं।
9. दो पहिया वाहनों को कारखाना गेट के अंदर पार्किंग की अनुमति दी जाए
10. यूनियन के पदाधिकारियों और सदस्यों का बदले की भावना से किया जा रहा उत्पीड़न और भेदभाव तुरन्त बंद किया जाए। यूनियन सदस्यों व पदाधिकारियों के विरुद्ध दायर झूठे मुकद्दमे वापिस लिए जाएं।
11. कारखाना में उच्च शिक्षित प्रबन्धकों के उपलब्ध होने के बावजूद एक ही प्रबन्धक को जो अनेक विभागों का जिम्मा सौंपा गया है उसे शीघ्र हटाया जाए। ऐसी स्थिति में श्रमिकों से अनेक विभागों का काम करवाया जाता है उस पर रोक लगाई जाए।
12. कारखाना में कैंटीन अधिकांश समय बंद कर दी जाती है जिससे श्रमिकों को पीने का पानी नहीं मिल पाता। अतः कैंटीन को पूरा समय खुला रखा जाए।
13. कारखाना में डॉक्टर की नियुक्ति की जाए
14. वेव सोल्डरिंग मशीन पर कार्य करने के लिए महिला श्रमिकों को न लगाया जाए और वहां कार्यरत अन्य श्रमिकों को विशेष भत्ता दिया जाए।

15. वर्षों से आरामदायक कार्यों में लगाए गए श्रमिकों को उन श्रमिकों के स्थान पर कार्य पर लगाया जाए जो वर्षों से अपेक्षाकृत कठिन कार्यों पर लगाए गए हैं।

16. वर्ष के अंत में शेष अर्जित अवकाशों की संख्या 120 की जाए।

4. In the footnote of the claim petition, the following prayer clause has been appended, reads as under:

“Now it is therefore prayed that demands raised in the demand notice dated 29.03.2019 are just and reasonable as explained above and detailed in the statement of claim in sub para i to xv of para 4 of the claim petition and as such petitioner union pray to award all the demands in favour of the workmen and against the respondent management. It is also prayed that the suspension orders of the office bearers of the union kindly be revoked and also prayed to set a side that order of transfer of 10 workmen named as above in the claim petition as those orders are malafide malice and discriminatory issued as unfair labour practices and colorable exercise of the employers rights. The said order may kindly be set aside while awarding reinstatement to the above named workmen with full back wages seniority and continuity in the services of the respondent company and demands of the workmen be awarded to impart justice to the union and the workmen at large with cost throughout”.

5. The lis was resisted and contested by the respondent by filing written reply wherein preliminary objection qua its maintainability, cause of action and not approached the Court with clean hands were raised.

6. On merits, it is submitted that the demand charter under Section 2K of the act are only in the form of general demands and nowhere depicts any kind of Industrial Dispute in terms of section 2K of the Act. The demand vide demand charter are beyond any statutory obligation on the part of the respondent. The respondent in compliance to all its statutory obligation towards its workmen. Any action on the part of the respondent management has been initiated only after taking into consideration the law of the land. It is denied that the respondent instead of negotiating with the petitioner union, started victimization of the workmen. The demands raised by the petitioner union were to be taken care of in the form of collective bargaining by the parties and the petitioner union is in mood to back off on its specific demands like salary hike, promotion policy, increasing in loan limits etc.

7. However, the plea/submission raised on behalf of the respondent management to the explanation and submission vide statement of claim to these demands are as under:

- (i) That the demand of the petitioner union regarding hike/increase in the salary as per the previous prevalent practice has given through long term settlements is illegal and beyond the prudent imagination. The contents as referring to the past prevalent practices adopted for the salary hike cannot be a precedent for the future salary hike in any given circumstances.
- (ii) So far as concerning the demand no. 2 that is removal of anomalies in the pay pattern is concern the same has been denied as there exist no anomalies in the pay pattern on similarly situated workmen. The difference, if any, in the pay received by the similarly situated workmen could have been due to the work experience, time of engagement and the work performance thereto.

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- (iii) The demand no.3 for grant of extra benefits to those workmen who have attained higher qualifications with the permission of the management is denied. The respondent is not in a position to grant any special increment due to its financial capacity.
- (iv) The respondent has denied to have failed to implement the promotion policy in its letter and spirit.
- (v) The demand regarding increase in loan limit and to simplify the procedure for disbursing the loan, it is submitted that the petitioner union cannot dictate its terms on the financial functioning or policy making of the respondent.
- (vi) The demand no. 6, raised by the petitioner union regarding grant of 50% subsidy on meals and on other canteen products, it is submitted that the respondent management had outsourced its canteen to a contractor though the quality of the items served therein were regularly monitored by the management to be of the best quality and the meals to the workmen is provided on subsidized rates.
- (vii) The demand raised by the petitioner union qua maintenance of union office is concerned, the same was to be taken care of by the petitioner union itself and the respondent has no obligation with regard to the same.
- (viii) It is submitted that the contractual staff is being paid their salary by the contractor and for the work assigned to the contractual staff, the respondent had not engaged any other employee for the similar type of work. The contractual staff stands withdrawn by the contractor, hence, there is no question for regularization of workmen engaged through contractor.
- (ix) So far as the demand regarding parking for vehicle inside the factory gate is concerned, it is submitted that there is no such space inside the factory premises of the respondent which can be specifically earmarked for the parking of two wheelers.
- (x) The demand raised by the petitioner qua discrimination against the union office bearers and members be stopped, in this regard it is submitted that the respondent management had never engaged into any kind of unfair labour practice against the office bearers and other activist of the union.
- (xi) The demand raised by the petitioner union regarding allotment of the department heads to each department independently is concerned, it is submitted that the functioning of the departments is to be taken care of by the respondent itself and the petitioner union has no right and role in the administrative matters.
- (xii) So far as concerning the demand regarding appointment of some qualified person to provide first medical aid is concerned, it is submitted that the respondent has made available first aid boxes in the premises and in case of emergency the ESI dispensary is only about 100 mtrs. away from the factory premises.
- (xiii) The demand raised by the petitioner union regarding women workers not to deploy for working on wave soldering machine being a dangerous operations is concerned, it is submitted that to operate the machines all safety measures is taken care by the respondent and no incident stand reported on the working of said machines.
- (xiv) The demand regarding deployment of all workmen in rotation in every department is concerned it is submitted that the deployment of the concerned workmen for a

particular job relies upon the work, experience and qualification, hence, it is wrong on the part of the petitioner to raise such a demand.

- (xv) The demand raised by the petitioner union regarding accumulation of earned leave is concerned the same is unjust as the earned leave to the workmen are strictly governed by the industrial law as well as the standing orders applicable to the respondent.

8. Therefore, keeping in view the above submissions, it is therefore prayed that the demand charter dated 29.3.2019 and subsequent reference of the same to this Tribunal along-with the present petition may kindly be dismissed with heavy costs being unjust, beyond the precincts of the industrial laws applicable in the interest of justice and fair play.

9. While filing rejoinder, the petitioner controverted the averments made thereto in the reply filed by respondent and reaffirmed and reiterated those raised in the claim petition.

10. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide Court order dated 17.03.2022, as under:

1. Whether the 16 points demand charter dated 29.3.2019 raised by the petitioner's union before the respondent management for its fulfilment is proper and justified? . . .*OPP*.
2. If issue no.1 is proved in affirmative than what service benefits the petitioners are entitled to? . . .*OPP* .
3. Whether the demand charter dated 29.03.2019 and subsequently reference sent by the appropriate government is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

11. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

12. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

13. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 No

Issue No. 2 Not entitled to any relief.

Issue No. 3 No

Relief Reference is answered in negative per operative part of award

REASONS FOR FINDINGS

ISSUES NO. 1 & 2

14. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

15. In order to substantiate its case, the petitioner union has examined Shri Anup Sharma, General Secretary of the union as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the claim petition. He also tendered in evidence demand notice (PW-1/B), memorandum of settlement dated 4.7.2017 (PW-1/C), settlement dated 17.07.2013 (PW-1/D) and settlement dated 09.03.2011 (PW-1/E).

16. In cross-examination, he denied that there is no description about the work order and profit of the respondent company on the website. He denied that the respondent company is having its various branches, factories and project sites all over the country. He admitted that the demand charter raised by the union is pertaining to the Solan unit. He further admitted that no one of the union members is working with the respondent company at Solan. He denied that there is either no work or very less work left with the company since 2005. He does not remember that 66 people had opted for VRS and 40 people had opted for new place of posting. He denied that the employees were getting their dues as per law prior to the issuance of notice of shifting. He further denied that the management had asked the union to withdraw their demand of salary hike, loan limit and promotion. He admitted that as per settlement (PW-1/C), it was agreed that the management will consider the demand once the financial position of the unit was improved.

17. On the other hand, the respondent company has examined one Shri G.S. Rana, Manager HR of the respondent company as (RW-1), who tendered into evidence his sworn-in affidavit (RW-1/A) wherein he reiterated almost all the averments as made thereto in the reply filed on behalf of respondent company. He also tendered into evidence profit and loss statement (RW-1/B), notice of shifting (RW-1/C), VRS 2020 (RW-1/D), VRS 2012 (RW-1/E), VRS dated 20.7.2013 (RW-1/F), circular of VRS 2014 (RW-1/G) and VRS 2017 (RW-1/H).

18. In cross-examination, he denied that the petitioner union had not assaulted or caused any malfeasance with the officers of the company. He further denied that the statement (RW-1/B) is based on concocted facts and not portraying the factual position and not prepared by the CA. He admitted that no letter was written to any Government Department that there is no work left with the company. He further admitted that the respondent unit is incurring expenditure to the tune of Rs. 76.86 crores as establishment including 5.90 crore administrative expenses. He denied that after the transfer and termination of the workers, the managerial staff of the unit were given 15% hike in the salary. He denied that the managerial staff was promoted during this period. He denied that the retired workers were also retained by the company. He denied that LTS was executed in the year 2017 by giving 45% hike to the workers. He admitted that they did not offer any percentage hike in the salary. He denied that there is no parking facility in the company. He further denied that 10 workers were transferred outside the state during the pendency of the reference. He admitted that no meeting of the workers union was called before implementing the VRS 2020.

19. This is the entire oral as well as documentary evidence led from the side of both the parties.

20. Shri J. C. Bhardwaj, AR for the petitioner union has vehemently argued that the demands raised in the demand notice dated 29.03.2019, are just and reasonable. The respondent management resorted to unfair labour practices and suspended three officer bearers of the workers union and 10 executive members during the pendency of the demand notice demand notice dated 29.03.2019. In order to built the pressure upon the trade activist, the management victimized these workmen and transferred them at faraway places by issuing transfer orders which were unlawful, illegal, null and void and in operative. The demand charter under section 2K of the Act was raised by the workers union by raising 16 demands. To which the respondent management did not agreed to settle the matter by following the principles of collective bargaining. It is therefore prayed that the claim filed by the petitioner union may kindly be allowed.

21. On the contrary, Sh. Vikas Chauhan, learned counsel for the respondent contended with all vehemence that it is not the company but the petitioner union indulged in unfair practice by not following the principal of collective bargaining in good faith. As per Section 2(ra), unfair labour practice means any of the practice specified in 5th Schedule. The 5th Schedule Part-II, relating to the workmen and Trade Union vide clause III, describes that the recognized union refuses to bargaining collectively in good faith shall be amounted to unfair labour practice on the part of the workers. The Ld. Counsel has also carried me through the evidence part and it is argued that the petitioner union failed to accept the request of the management for collective bargaining, in good faith. It is also argued that due to incurring business losses and the company which is in continuous loss for one decade and the financial loss incurred to the company amounting to Rs. 500 crore in the year 2009-10. Moreso, the petitioner union had failed to take an overall view of the long term settlement, VRS Policy, financial condition of the company and other factors into consideration. It is therefore prayed that the claim filed by the petitioner union may kindly be dismissed and the reference may kindly be answered in negative.

22. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

23. Before proceedings further, I would like to re-produce Sections 2K, 2 (ra), Fifth Schedule of the Act, from 1 to 7 and 1 to 8, are reads as under:

Section 2-K “Industrial dispute” means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.”

Section 2(ra) “unfair labour practice” means any of the practices specified in the Fifth Schedule.

FIFTH SCHEDULE “UNFAIR LABOUR PRACTICES

I. On the part of employers and trade unions of employers.—

1. To interfere with, restrain from, or coerce, workmen in the exercise of, their right to organize, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, that is to say:—
 - (a) threatening workmen with discharge or dismissal, if they join a trade union;
 - (b) threatening a lock-out or closure, if a trade union is organized;
 - (c) granting wage increase to workmen at crucial periods of trade union organization, with a view to undermining the efforts of the trade union organization.
2. To dominate, interfere with or contribute support, financial or otherwise, to any trade union, that is to say :—
 - (a) an employer taking an active interest in organizing a trade union of his workmen; and
 - (b) an employer showing partiality or granting favor to one of several trade unions attempting to organize his workmen or to its members, where such a trade union is not a recognized trade union.

3. To establish employer sponsored trade unions of workmen.
4. To encourage or discourage membership in any trade union by discriminating against any workman, that is to say :—
 - (a) discharging or punishing a workman, because he urged other workmen to join or organize a trade union;
 - (b) discharging or dismissing a workman for taking part in any strike (not being a strike which is deemed to be an illegal strike under this Act);
 - (c) changing seniority rating of workmen because of trade union activities;
 - (d) refusing to promote workmen to higher posts on account of their trade union activities;
 - (e) giving unmerited promotions to certain workmen with a view to creating discord amongst other workmen, or to undermine the strength of their trade union;
 - (f) discharging office-bearers or active members of the trade union on account of their trade union activities.
5. To discharge or dismiss workmen—
 - (a) by way of victimization;
 - (b) not in good faith, but in the colorable exercise of the employer's rights;
 - (c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
 - (d) for patently false reasons;
 - (e) on untrue or trumped up allegations of absence without leave;
 - (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
 - (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record or service of the workman, thereby leading to a disproportionate punishment.
6. To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike.
7. To transfer a workman mala fide from one place to another, under the guise of following management policy.

II. ON THE PART OF THE WORKMEN AND TRADE UNION OF WORKMEN

1. To advise or actively support or instigate any strike deemed to be illegal under this Act.
2. To coerce workmen in the exercise of their right to self-organization or to join a trade union or refrain from joining any trade union, that is to say:—

- (a) for a trade union or its members to picketing in such a manner that non-striking workmen are physically debarred from entering the work places;
- (b) to indulge in acts of force or violence or to hold out threats of intimidation in connection with a strike against non-striking work men or against managerial staff.
3. For a recognized union to refuse to bargain collectively in good faith with the employer.
4. To indulge in coercive activities against certification of a bargaining representative.
5. To stage, encourage or instigate such forms of coercive actions as wilful "go slow", squatting on the work premises after working hours or "gherao" of any of the members of the managerial or other staff.
6. To stage demonstrations at the residences of the employers or the managerial staff members.
7. To incite or indulge in wilful damage to employer's property connected with the industry.
8. To indulge in acts of force or violence or to hold out threats of intimidation against any workman with a view to prevent him from attending work".

24. Under Section 2K of the Act, the Tribunal got immense power for adjudication of the industrial dispute under the labour laws. It is settled law that, even if, the appropriate government inadvertently, wrongly or even deliberately referred the Industrial Dispute for adjudication under Section 2K of the Act, the tribunal has still the power for adjudication, if from the material, it could be culled out from the facts and circumstances of the case that the dispute has come into existence under Section 2-A of the Act, which defines that any employer discharges, dismisses, retrenches or otherwise terminates the services of any individual workmen, any dispute or difference between the employer and employee connected with or arising out shall be deemed to be an industrial dispute. The unfair labour practices are those practices, which are specified in Fifth Schedule Part-1, signifies the unfair labour practices on the part of the employer and trade union of the employer, as mentioned *ibid*. Part-2 dealt with the unfair practices on the part of workmen and trade union of the workmen, as mentioned *ibid*. In this case, the petitioner union had implied the unfair labour practice on the part of respondent management to transfer the workmen from one place to another malafidely, under the guise of following management policy. On the other hand, the respondent management entailed the unfair labour practices on the part of workmen and trade union for refusal to bargaining collectively in good faith with the employer and to stage, encourage or instigate such force of corrosive action as wilful, go slow and squatting on the premises after working hours such as "Gherao" of the managerial and other staff, to stage demonstration at the residences of the employer or managerial staff members and to incite or indulge in an act of force or violence or willful damage to the employer property.

25. Without lamenting much on the merits of the case, this Tribunal after careful examination of the entire case record, it is manifestly demonstrated that the petitioner union is a registered union which has raised the demands charter dated 28.03.2019 having been surfaced in the office of Labour Commissioner, who had referred the dispute to this Court for its legal adjudication. As per demand charter, there were as many as 16 demands raised from the side of the petitioner union. Some of the demands are merely demands for the demand sake. Admittedly, all these demands are general in nature and do not connote with any specific demands. After taking into consideration the entire demand charter, I am of the considered opinion that the first five

demands are the pivotal demands, which are relating to the hike/increase in the salary to the extent of 25%, removing the pay anomalies in the pay pattern reviewing the promotion policy and increasing the loan facilities and so on are taken up for the purpose of discussion and deliberation through this award. However, rest of the demand do not require much discussion and deliberation by this Tribunal and shall be within the purview, ambit, scope and jurisdiction of the appropriate government itself to peep into the same and pass the required appropriate orders/directions in the adherence to the strict compliance of the mandate of the law of land.

26. At the very outset, the first five demands, which are fiscal in nature relating to the financial capacity of the respondent management are taken into consideration. First of all, the petitioner union had raised the demand of hike/increase in the salary to the extent of 25%. It is asserted from the side of the petitioner union that as per previous long term settlement the petitioner/workers were allowed 15% hike/ increase in their salary on gross amount every year. The officers/executives of the company were given hike of 20%. It is submitted that in view of upward trend and increase in the price of essential commodities there must be 25% hike in the present salary. On the other hand, the respondent resisted the said demand by asserting that by hike of 25% in every year would result into 100% hike in the salary of the workers in coming next 4 years and the said demand is not genuine and admitted to be practical. The grant of 25% hike in the salary was not at all possible at this stage. No doubt, both the parties are asserting their contrary plea's in support of their respective claim. In any case, it is clearly established on record that in the previous long term settlement arrived at between the parties, the petitioners, were granted increment of 10% for the year 2013-14 and 2015. Similarly, there was hike of 15% and 10% each for the second and third year commencing from 2016-17 and 2018. Now, the petitioner union has raised the plea of 25% hike in the gross salary of the worker since 2019. The only plea raised from the side of the respondent management is that it is not feasible to order the hike or increase in the salary as the respondent management is facing an acute financial crisis. This matter has been discussed and scribed in the previous long term settlement in the year 2010, 2013 and 2017. It is argued that the petitioner himself admitted in his cross examination that the management agreed to consider the demand only in case the financial position of the company was improved with the passage of time. It is an admitted fact that the company had incurred the financial loss to the tune of Rs. 500 crore in the year 2009 and 2010.

27. Admittedly, the respondent management deals in the business of manufacturing of telecom equipment's. With the start/advent of 2G/3G spectrum, there was a huge crisis arose in the telecom sector after the great connectivity and easy accessibility to the mobile devices in the market. The land line numbers remained useless in the household and become a part of show piece's not only in the house hold but also in the offices. Therefore, there is a huge decrease in the demand of BSNL or MTNL services. By the advent of new emerging trends in the use of cellular phones/devices, there was also a steep increase in the category of service provider *i.e.* mobile service operators or networking etc. The mobile industry has boomed like anything. What to talk of the telecom apparatus or equipment's etc. It is also admitted fact that the respondent unit had suffered huge financial crisis or loss since long. The respondent management had issued the notice of shifting dated 20.02.2020. They also launches the VRS by mentioning their financial condition to which many employees had opted for the same. It is a matter of common parlance that no company would launch VRS if the company is sailing, smoothly or earning profit. Such an alarming situation arose only when there are disturbed facts and forcing the respondent management to do so.

28. Conclusively, in an earlier occasion the respondent management had taken care of all the demands raised from the side of the workers union and had addressed each and every grievance relating to the worker. In an act of principle of collective bargaining each and every party share the equal burden. Since, the company had incurred loss worth Rs. 500 crore which is not a meager amount and the company is not earning any profit and is not in a position to give

hike/salary of the worker. Moreso, it is also proved that the company is also incurring establishment cost, employees cost, administrative expenses. The annual operating cost of Rs. 9 crore for last 4 years reeling into respondent operation into huge losses. Since the company is in continuous loss for past decade and the manufacturing operation had become unviable, there is practically no work order left in the factory. Therefore, so far as concerning the other demands No. 2 to 5, such as removal of pay anomalies in the pay pattern, grant of extra benefit to those benefit to those workmen who have attained the higher qualification, promotion policy and increase in loan limit, are concerned all these demands are also pertained to the fiscal or financial implying burden on the company. At the cost of repetition the company is reeling into huge financial loss to the tune of Rs. 500 crore. The manufacturing of wire line based telecommunication equipment's had suffered effectively. On account of liberalization of Government policies, the respondent management had suffered lot resulting into huge financial losses had increased day by day.

29. Despite the negligible operation the employer has incurred established cost to the tune of Rs. 76.86 crore out of which the employee cost is Rs. 70.96 crore and other administrative expenses is Rs. 5.90 crore. The annual operation cost is Rs. 9 crore. Taking into consideration, the P/L statement, the respondent management had incurred the losses of Rs. 226 crore in the financial year 2009-10, Rs. 38 crore in the year 2010-11, Rs. 21 crore in the year 2011-12, approximately, Rs. 15 Crore in the year 2012-2013, Rs. 17 crore in the year of 2013-14, Rs. 35.5 crore in the year 2014-2015, Rs. 9 crore 2015-2016, Rs. 10 crore in the year 2016-2017, Rs. 10 crore in the year 2017-2018, Rs. 11 crore in the year 2018-2019, Rs. 11 crore in the year 2019-2020, and as such in total, the respondent company had incurred total financial loss for last 10 years from the financial year 2009-10 to 2019-20, which has accumulated to the tune of Rs. 200 crore approximately. All these demands are pertaining to the financial burden, which cannot be granted at this stage, as the company is already facing the financial crises.

30. So far as concerning the rest of the demands, which have been raised vide demand notice are large in number and are out of the purview and jurisdiction of this Tribunal, because the Tribunals are not supposed to express its opinion or give its judgment to the quality of tea and so on. In such like circumstances, if the Tribunal is to give its verdict, finding or judgment on such petty or trivial issues such as quality of tea, use of refrigerator, allotment of parking slots, providing of tea vending machine, subsidized canteen products etc., which would be totally uncalled for and diminishing the ambit and scope, power and jurisdiction of the Industrial Tribunal established under the Act so it would lead to a precarious situation of nothing but sheer abuse of process of law. At the cost of repetition, such innocuous demands, which were referred to this court are nothing but to waste the judicial hours of the Court. These demands are pertaining to the providing of refrigerator, removing the tea vending machine, improving the quality of tea, providing of parking slots repair of union office granting 50% subsidy in the canteen products, appointment of Doctor, removing of web soldering machine etc. and so on. More particularly, all these demands are within the purview and jurisdiction of the appropriate government. The appropriate government through its machinery setup under the Act by involving Labour Commissioner, Joint Labour Commissioner, Labour Officers and Labour inspector etc., who have acted on such demands by effecting appropriate participation of both the parties such as conciliation, mediation bargaining etc. While disposing off the reference, it would however be apposite to bring it to the notice of the "Appropriate Government" that apparently the work of conciliation and making reference is being done too cursorily, to say the least. A perusal of the demand notice dated 29.03.2019, clearly demonstrates that as much as 16 demands were raised by the workmen and that too for 50% subsidy in the canteen, repair of union office, parking, discrimination against the office bearers of the union, appointment of Doctor, women workers not be deployed on soldering machines being dangerous, deployment of all workmen in rotation in every department, accumulation of earned leave etc.

31. If for improving the quality of tea, providing of refrigerator, removing the tea vending machine, providing of parking slots repair of union office granting 50% subsidy in the canteen products, appointment of Doctor, removing of web soldering machine etc. etc., the workmen have to knock at the doors of justice, apparently, the Labour Department is not being able to protect the basic inherent and inviolable rights of the workmen. The aforesaid innocuous, insignificant demands should have been taken care of, at the very inception by the Labour Commissioner, itself. It should not have even been referred to the appropriate government, forget the Court. No endeavour whatsoever seems to have been made for settlement, nor any consideration was made while referring it for adjudication. The implementation and protection of Labour Laws do require some sensitized behavior and not a cursory glance, merely shifting the onus to this Court/Tribunal and that too summarily. It thus somehow reflects on the working of the State and the Department. Without adverting any further, suffice it to say that a copy of the award be sent to the appropriate government for effecting some remedial measures, if so desired. First and foremost, seeing to the trivial nature of the dispute the Labour Commissioner should have ensured that the demands no. 6 to 16 as raised in the demand charter, were settled at the threshold itself. The Labour Commissioner was duty bound to have ensured its compliance. Even, if it could not be done, while considering the failure report under sub section 5 of section 12 of the Act, the appropriate government should have at least taken the pains of considering the failure report and reasons thereof before making a reference. Due "consideration" is a statutory requirement under section 12 of the Act. It has gone amiss. Accordingly, both these issues are answered in negative.

ISSUE NO. 3

32. In order to prove this issue, no specific evidence has been led from the side of the respondent which could go to show as to how the demand charter dated 29.3.2019 and subsequently reference sent by the appropriate government is not maintainable. Moreover, the demand charter dated 29.3.2019 was raised by the petitioner union under section 2-K of the Act whereupon the present reference has been received from the appropriate government for legal adjudication. I find no illegality in the demand charter dated 29.3.2019, and subsequent reference, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner union and against the respondent.

RELIEF

33. As a sequel to my above discussion and findings on issues no.1 to 3, **the claim arising 16 points demand charter dated 29.3.2019, raised from the petitioner union on demands no.1 to 5, is hereby answered in negative. The workers of petitioner union are not entitled to any relief. However, the Labour Commissioner of H.P., is hereby directed to effect some remedial measures, if so desired, on demands no. 6 to 16, raised by the petitioner union vide demand notice dated 29.3.2019, strictly in accordance with law, as the same are out of the purview and jurisdiction of this Tribunal.** The reference is disposed off in the aforesaid terms.

34. Let a copy of this award be communicated to the appropriate government for publication in official gazette and a copy to Labour Commissioner, HP for effecting some remedial measures, in the matter, if so desired. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 141 of 2019
Instituted on : 1-10-2021
Decided on : 01-11-2022

Himachal Futuristic Communications Ltd. Group Mazdoor Sangh (Reg. No. 747)
Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. through its General
Secretary. .*Petitioner.* .

Versus

The Factory Manager, M/s Himachal Futuristic Communications Ltd., Electronics
Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. .*Respondent.*

Reference under section 10 of the Industrial Disputes Act, 1947

For Petitioner : Shri J.C. Bhardwaj, AR
For Respondent : Shri Vikas Chauhan, Advocate

AWARD

The following reference petition has been, received from the Appropriate Government vide notification dated 19.09.2020, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication, which reads as under:

“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? If not, what are its effects?”

“Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P to serve the lock-out notice dated 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”

2. Material facts necessary for the disposal of the present claim petition are thus that the partial lock-out in the respondent company is the result of pre-planned conspiracy of the respondent management. The fact of the case that the petitioner union served the demand notice dated 19.3.2019, for the redressal of their grievances vide demand charter raised under section 2-K of the Act to which the respondent management resorted to unfair labour practice. It is submitted that the workers of petitioner union were the active trade union activist and the suspension of these office bearers is in contravention of section 33 of the Act being the protected workmen. The respondent management also transferred ten workers, who were responsible trade union activist and were main instruments in perusing the demand notice. The lock-out was declared against the provisions of the Act, which is totally illegal. The said illegal lock-out was resorted only for active members of the union on 27.7.2019 to which the union made a representation to the Joint Labour Commissioner, Shimla on 20.9.2019, as a result of which, vide order dated 28.9.2019, the Labour Commissioner prohibited the continuation of the lock-out by the respondent management with immediate effect. However the respondent management continued the lock-out. The union made a representation and the workers were not allowed to resume their duties. The Police was called. The union also made reference to the S.P. Solan and SDM Solan. The respondent management inspite of the prohibition order did not lift the lock-out.

3. In the footnote of the claim petition, the following prayer clause has been appended:

“Now it is therefore prayed that the impugned action of the management is a periodic repetition of its efforts aimed at the members of the petitioner union to drive them to penury and destroy the petitioner union. It is therefore submitted that the demand of the management is an unfair labour practice and it is violative of the fundamental rights guaranteed in Article 19 and 21 of the Constitution of India. It is further prayed that the illegal notice of lock-out dated 27.7.2019, may kindly be quashed and set aside and the illegal lock-out of 59 workmen may kindly be awarded/granted their salary and other consequential benefits w.e.f. 29.7.2019 till 10.10.2019 (2 months and 11 days), with interest and cost throughout”.

4. The lis was resisted and contested by the respondent management by filing written reply wherein preliminary objection of maintainability, not approached the Court with clean hands and cause of action and were raised.

5. On merits, it is submitted that the statement of claim filed by the petitioner union is not at all in consonance with the record. The lock-out notice dated 27.7.2019, effective from 29.7.2019, against the 63 employees were issued in the wake of the notice that the petitioner union had resorted to illegal strike, Gherao/Dharna within the factory premises. The continued strike, Gherao/Dharna initiated the management to issue the lock-out notice. The copy of photographs and CCTV footage of illegal strike, Dharna/Gherao and unfair labour practice adopted by the workers of petitioner union w.e.f. 12.7.2019 to 27.7.2019, is a matter of record. Not only this, the workers of petitioner union used abusive language, raised defamatory slogans against the respondent management.

6. Therefore, keeping in view the above submissions, it is therefore prayed that the present reference in hand along-with the present petition be dismissed with heavy costs being unjust and beyond the precincts of the industrial law applicable in the interest of justice and fair play.

7. While filing rejoinder, the petitioner controverted the averments made thereto in the reply filed by respondent and re-affirmed and reiterated those raised in the claim petition. It is submitted that the respondent management had bent upon to get rid of the workmen, who were the

part of the union and having allegiance with the union, otherwise the demands raised by the petitioner union are not only genuine but those are requirement of the days, as price rise has gone sky high. The workmen had worked for 25 to 30 years, hence, the demands raised by the petitioner union are not new but those are as per prevalent practice for long term settlement and based on give and take analogy.

8. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide Court order dated 01.08.2022, as under:

1. Whether the action of the HFCL Mazdoor Sangh to resort to strike w.e.f. 12.07.2019, as alleged by the respondent, is illegal and unjustified? If so, what are its effects?. .*OPP*.
2. Whether action of management to serve the lock-out notice dated 27.07.2019 and to active alter his provisions effective from 29.07.2019 at 9.00 AM is illegal and unjustified? If so, what are its effects? . .*OPP*.
3. Whether the claim petition is neither competent nor maintainable in the present form, as alleged? . .*OPR*.
4. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 Yes

Issue No. 2 Yes

Issue No. 3 No

Relief Reference is answered in negative per operative part of award.

REASONS FOR FINDINGS

12. In order to substantiate its case, the petitioner union has examined Shri Anup Sharma, General Secretary of the union as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the claim petition. He also tendered in evidence demand notice (PW-1/B), order dated 18.3.2020 (P-2), show cause notice (P-3), order dated 28.9.2019 (P-4), letter dated 30.9.2019 (P-5), letters to Labour-cum-Conciliation Officer (P-6) to (P-8), letter to SP (P-9), representation Mark PX-1, affidavit Mark PX-2, letter to SDM Mark PX-3 and undertaking Mark PX-4.

13. In cross-examination, he admitted that Ms. Pushpa was transferred on 12.2.2019 from Unit-II to Unit-V, which is within radius of 2 kilometers. He denied that on 14.2.2019, she entered the unit-II forcefully along-with other union leaders and resorted to Gherao, Dharna and strike in front the Plant Head Office. He admitted that the matter was settled by the conciliation officer on

14.2.2019. He denied that the union leaders started pressuring the management either to cancel the transfer order of Pushpa Devi or they will get the allotment/registration of the Unit-V of the company cancelled. He admitted that the Secretary and the President of the union had written to District Industries Centre, Solan for cancellation of the land allotment and registration vide letter dated 16.2.2019. He further admitted that as per letter it was requested that the land and complex be given to some other company. He also admitted that the President, General Secretary and Joint Secretary was suspended on 12.7.2019. He denied that they instigated the other employees to go for strike after 12.7.2019. He denied that the strike remained from 12.7.2019 to 25.7.2019, after which the lock-out notice was issued by the company on 27.7.2019. He admitted that no notice was given before going on strike. He admitted that the Civil Court, Solan ordered the Police assistance to the company.

14. On the other hand, the respondent company has examined one Shri G.S Rana, Manager HR of the respondent company as (RW-1), who tendered into evidence his sworn-in affidavit (RW-1/A), wherein he reiterated almost all the averments as made thereto in the reply filed on behalf of respondent company. He also tendered into evidence copy of order dated 26.11.2019, passed by the Hon'ble High Court (R-1), lock-out notice (R-2), transfer order (R-3), conciliation proceedings (R-4, complaint dated 16.2.2019 (R-5), letters (R-6) to (R-12), suspension letters (R-13) to (R-15), notices (R-16) to (R-28), complaint to SHO Solan (R-29), copy of order dated 5.10.2018 (R-30), copy of order dated 2.8.2019 (R-31), copy of shifting notice dated 20.2.2020 (R-32), copy of final payment to 66 employees under VRS 2020 (R-33) and pen drive along-with certificate under section 65-B (R-34).

15. In cross-examination, he denied that there was no strike. He further denied that the union representatives mainly Ramesh Dutt, Anup Kumar and Pushpa had not instigated the workmen to go on strike. He admitted that all the three leaders were outside the factory gate and did not enter the factory premises. He admitted that at the time of strike, Gherao etc., the Police used to remain present at the factory premises. He denied that the strike, Gherao etc., was installed at the instigation of plant head, who used to call the workers and used to instigate them. He admitted that no prior permission was obtained before issuing lock-out. He denied that the union leaders were not allowed to use the union office. He admitted that the lock-out was prohibited by the Labour Commissioner on 28.9.2019. He denied that no damage to the official property was caused by the workers.

16. This is the oral as well as documentary evidence led from the side of the parties.

17. Shri J. C. Bhardwaj, AR for the petitioner union has vehemently argued that the lock-out is a result of well thought and planned conspiracy of the management and during the period of lock-out, the workmen were not paid their wages. It is proved on record that the illegal lock-out was prohibited by the Labour Commissioner vide order dated 28.9.2019 but despite prohibition order, the respondent management had not lifted the lock-out for 49 workmen. He argued that during the pendency of demand notice dated 29.3.2019, the respondent company suspended the office bearers of the workers union. The workers of the petitioner union never resorted to strike, Dharna/Gherao etc.

It is therefore prayed that the claim filed by the petitioner union may kindly be allowed.

18. On the contrary, Sh. Vikas Chauhan, learned counsel for the respondent contended that it is not the company but the petitioner union indulged in unfair practice by not following the principal of collective bargaining in good faith. As per Section 2(ra), unfair labour practice means any of the practice specified in 5th Schedule. The 5th Schedule Part-II, relating to the workmen and Trade Union vide clause III, describes that the recognized union refuses to bargaining collectively

in good faith shall be amounted to unfair labour practice on the part of the workers. The Ld. Counsel has also carried me through the evidence part and it is argued that the petitioner union failed to accept the request of the management for collective bargaining, in good faith. It is also argued that due to incurring business losses and the company which is in continuous loss for one decade and the financial loss incurred to the company amounting to Rs. 500 crore in the year 2009-10. Moreso, the petitioner union had failed to take an overall view of the long term settlement, VRS Policy, financial condition of the company and other factors into consideration. It is therefore prayed that the claim filed by the petitioner union may kindly be dismissed and the reference may kindly be answered in negative.

19. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

20. Before proceedings further, I would like to re-produce Section 2K of the Act which is reads as under:

“Industrial dispute” means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.”

21. Section 2(ra) reads as under:—

“unfair labour practice” means any of the practices specified in the Fifth Schedule.

22. Fifth Schedule reads as under:—

“UNFAIR LABOUR PRACTICES

I. On the part of employers and trade unions of employers—

1. To interfere with, restrain from, or coerce, workmen in the exercise of, their right to organize, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, that is to say:—

- (a) threatening workmen with discharge or dismissal, if they join a trade union;
- (b) threatening a lock-out or closure, if a trade union is organized;
- (c) granting wage increase to workmen at crucial periods of trade union organization, with a view to undermining the efforts of the trade union organization.

2. To dominate, interfere with or contribute support, financial or otherwise, to any trade union, that is to say :—

- (a) an employer taking an active interest in organizing a trade union of his workmen; and
- (b) an employer showing partiality or granting favor to one of several trade unions attempting to organize his workmen or to its members, where such a trade union is not a recognized trade union.

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3. To establish employer sponsored trade unions of workmen.
 4. To encourage or discourage membership in any trade union by discriminating against any workman, that is to say :—
 - (a) discharging or punishing a workman, because he urged other workmen to join or organize a trade union;
 - (b) discharging or dismissing a workman for taking part in any strike (not being a strike which is deemed to be an illegal strike under this Act);
 - (c) changing seniority rating of workmen because of trade union activities;
 - (d) refusing to promote workmen to higher posts on account of their trade union activities;
 - (e) giving unmerited promotions to certain workmen with a view to creating discord amongst other workmen, or to undermine the strength of their trade union;
 - (f) discharging office-bearers or active members of the trade union on account of their trade union activities.
 5. To discharge or dismiss workmen—
 - (a) by way of victimization;
 - (b) not in good faith, but in the colorable exercise of the employer's rights;
 - (c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
 - (d) for patently false reasons;
 - (e) on untrue or trumped up allegations of absence without leave;
 - (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
 - (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record or service of the workman, thereby leading to a disproportionate punishment.
 6. To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike.
 7. To transfer a workman malafide from one place to another, under the guise of following management policy.
 8. To insist upon individual workmen, who are on a legal strike to sign a good conduct bond, as a pre-condition to allowing them to resume work.
 9. To show favouritism or partiality to one set of workers regardless of merit.
 10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.

11. To discharge or discriminate against any workman for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.

12. To recruit workmen during a strike which is not an illegal strike.

13. Failure to implement award, settlement or agreement.

14. To indulge in acts of force or violence.

15. To refuse to bargain collectively, in good faith with the recognized trade unions.

16. Proposing or continuing a lock-out deemed to be illegal under this Act.

II. ON THE PART OF THE WORKMEN AND TRADE UNION OF WORKMEN

1. To advise or actively support or instigate any strike deemed to be illegal under this Act.

2. To coerce workmen in the exercise of their right to self-organization or to join a trade union or refrain from joining any trade union, that is to say:—

(a) for a trade union or its members to picketing in such a manner that non-striking workmen are physically debarred from entering the work places;

(b) to indulge in acts of force or violence or to hold out threats of intimidation in connection with a strike against non-striking workmen or against managerial staff.

3. For a recognized union to refuse to bargain collectively in good faith with the employer.

4. To indulge in coercive activities against certification of a bargaining representative.

5. To stage, encourage or instigate such forms of coercive actions as wilful "go slow", squatting on the work premises after working hours or "gherao" of any of the members of the managerial or other staff.

6. To stage demonstrations at the residences of the employers or the managerial staff members.

7. To incite or indulge in wilful damage to employer's property connected with the industry.

8. To indulge in acts of force or violence or to hold out threats of intimidation against any workman with a view to prevent him from attending work".

23. Under Section 2K of the Act, the Tribunal got the power for adjudication. It is settled law that, even if, the appropriate government inadvertently, wrongly or even deliberately referred the Industrial Dispute for adjudication under Section 2K of the Act, the tribunal has still the power for adjudication, if from the material, it could be culled out from the facts and circumstances of the case that the dispute has come into existence under Section 2-A of the Act which defines that any employer discharges, dismisses, retrenches or otherwise terminates the services of any individual workmen, any dispute or difference between the employer and employee connected with or arising

out shall be deemed to be an industrial dispute. The unfair labour practices are those practices which are specified in Fifth Schedule Part-1, signifies the unfair labour practices on the part of the employer and trade union of the employer. Part-2 dealt with the unfair practices on the part of workmen and trade union of the workmen. In this case, the petitioner union had implied the unfair labour practices on the part of respondent management to transfer the workmen from one place to another mala fide, under the guise of following management policy. On the other hand the respondent management entailed the unfair labour practices on the part of workmen and trade union for refusal to bargaining collectively in good faith with the employer and to stage, encourage or instigate such force of corrosive action as wilful, go slow and squatting on the premises after working hours such as Gherav of the managerial and other staff, to stage demonstration at the residences of the employer or managerial staff members and to incite or indulge in an act of force or violence or willful damage to the employer property.

24. Without lamenting much on the merits of the case, this Tribunal after careful examination of the case record, it is manifestly clear on record that the petitioner union is a registered union which has raised the demands charter dated 28.03.2019 having been surfaced in the office of Labour Commissioner, who had referred the dispute to this Court for its legal adjudication. As per demand charter there were as many as 16 demands raised from the side of the petitioner union. Some of the demands are merely demands for the demand sake. Admittedly all these demands are general in nature and do not denote with any specific demands. After taking into consideration the entire demand charter, I am of the considered opinion that the first five are the pivotal demands which are relating to the hike/increase in the salary to the extent of 25%, removing the pay anomalies in the pay pattern reviewing the promotion policy and increasing the loan facilities and so on are taken up for the purpose of discussion and deliberation through this award. However, rest of the demand do not require much discussion and deliberation by this court and shall be within the purview, ambit, scope and jurisdiction of the appropriate government itself to look into the same and pass appropriate orders/directions in the adherence to the strict compliance of the mandate of the law of land.

25. At the very outset the first five demands which are relating to the financial capacity of the respondent management are taken into consideration. First of all, the petitioner union raised the demand of hike/increase in the salary to the extent of 25%. It is asserted from the side of the petitioner union that as per previous long term settlement the petitioner/workers were allowed 15% hike/ increase in their salary on gross amount every year. The officers/executives of the company were given hike of 20%. It is submitted that in view of upward trend and increase in the price of essential commodities there must be 25% hike in the present salary. On the other hand the respondent resisted the said demand by asserting that by hike of 25% in every year would result into 100% hike in the salary of the workers in next 4 years and the said demand is not admitted to be practical. The grant of 25% hike in the salary was not possible at this stage. No doubt, both the parties are asserting their contrary plea in support of their respective claim. In any case it is clearly established on record that in the previous long term settlement arrived at between the parties, the petitioners, were granted increment of 10% for the year 2013-14 and 2015. Similarly there was hike of 15% and 10% each for the second and third year commencing from 2016-17 and 2018. Now, the petitioner union has raised the plea of 25% hike in the gross salary of the worker since 2019. The only plea raised from the side of the respondent management is that it is not possible to order the hike in the salary as the respondent management is facing an acute financial crisis. This matter has been discussed and scribed in the previous long term settlement in the year 2013, 2017 and MOM 2010. It is agreed that the petitioner himself admitted in his course examination that the management agreed to consider the demand only the financial position was improved. It is an admitted fact that the company had incurred the financial loss to the tune of Rs. 500 crore in the year 2009 and 2010. Admittedly, the respondent management deals in the business of manufacturing of telecom equipment's. With the start/advent of 2G/3G spectrum, there

was a huge crises arose in the telecom sector after the great connectivity and easy accessibility to the mobile devices in the market. The land line numbers remained useless in the household and become a part of show piece not only in the show room but also in the offices. Therefore there is a huge decrease in the demand of BSNL or MTNL services. By the mobile service operators or networks. The mobile industry has boomed like anything. What to talk of the telecom apparatus or equipment's. It is also admitted that the respondent a unit had suffered financial crises since long. The respondent management issued the notice of shifting dated 20.02.2020. They also launches the VRS by mentioning their financial condition to which many employees had opted for the same. It is a matter of common parlance that no company would launch VRS if the company is sailing, smoothly or earning profit. Such an alarming situation arose only when there are disturbed facts and forcing the respondent management to do so. Admittedly, in an earlier occasion the respondent management had taken care of all the demands raised from the side of the workers union and had addressed each and every grievances relating to the worker. In an act of principle of collective bargaining each and every party share the equal burden. Since, the company had incurred loss worth Rs. 500 crore which is not a meager amount and the company is not earning any profit and is not in a position to give hike/salary of the worker. More so, it is also proved that the company is also incurring establishment cost, employees cost, administrative expenses. The annual operating cost of Rs. 9 crore for last 4 years reeling into respondent operation into huge losses. Since the company is in continuous loss for past decade and the manufacturing operation had become unviable, there is practically no work order left in the factory. Therefore, so far as concerning the other demands No. 2 to 5 such as removal of pay anomalies in the pay pattern, grant of extra benefit to those benefit to those workmen who have attain the higher qualification, promotion policy and increase in loan limit, are concerned all these demands are also pertained to the fiscal or financial implying burden on the company. At the cost of reputation the company is reeling into huge financial loss to the tune of Rs. 500 crore. The manufacturing of wire line based telecommunication equipments had suffered effectively. On account of liberalization of Government policies, the respondent management had suffer alot the financial losses had increased day by day. Despite the negligible operation the employer has incurred established cost to the tune of Rs. 76.86 crore out of which the employee cost is Rs. 70.96 crore and other administrative expenses is Rs. 5.90 crore. The annual operation cost is Rs. 9 crore. Taking into consideration the P/L statement, the respondent management had incurred the losses of Rs. 226 crore in the financial year 2009-10, Rs. 38 crore in the year 2010-11, Rs. 21 crore in the year 2011-12, approximately, Rs. 15 Crore in the year 2012-2013, Rs. 17 crore in the year of 2013-14, Rs. 35.5 crore in the year 2014-2015, Rs. 9 crore in the year 2015-2016, Rs. 10 crore in the year 2016-2017, Rs. 10 crore in the year 2017-2018, Rs. 11 crore in the year 2018-2019, Rs. 11 crore in the year 2019-2020, and as such in total, the respondent company had incurred total financial loss for last 10 years from the financial year 2009-10 to 2019-20, which has accumulated to the tune of Rs. 200 crore approximately. All these demands are pertaining to the financial burden, which cannot be granted at this stage, as the company is already facing the financial crises.

26. So far as concerning the rest demands which have been raised vide demand notice are large in number and are out of the purview and jurisdiction of this Tribunal because the Tribunals are not suppose to express its opinion or give its judgment to the quality of tea and so on. Such an innocuous demands, which were referred to this court are nothing but an abuse of process of law just to waste the time of the court. These demands are pertaining to the providing of refrigerator, removing the tea vending machine, improving the quality of tea, providing of parking slots repair of union office granting 50% subsidy in the canteen products, appointment of Doctor, removing of web soldering machine etc. and so on. All these demands are within the purview and jurisdiction of the appropriate government. The appropriate government through its machinery setup under the act by involving Labour Commissioner, Joint Labour Commissioner, Labour Officers and Labour inspector etc., who have acted on such demands by effecting appropriate participation of both the parties such as conciliation etc. While disposing off the reference, it would however be apposite to

bring it to the notice of the “Appropriate Government” that apparently the work of conciliation and making reference is being done too cursorily, to say the least. A perusal of the demand notice dated 29.03.2019, shows that as much as 16 demands were raised by the workmen and that too for 50% subsidy in the canteen, repair of union office, parking, discrimination against the office bearers of the union, appointment of Doctor, women workers not be deployed on soldering machines being dangerous, deployment of all workmen in rotation in every department, accumulation of earned leave etc. First and foremost, seeing to the trivial nature of the dispute the Labour-cum-conciliation Officer, should have ensured that the demands no. 6 to 16 as raised in the demand charter, were settled at the threshold itself. The Labour-cum-Conciliation Officer was duty bound to have ensured its compliance. Even, if it could not be done, while considering the failure report under sub section 5 of section 12 of the Act, the appropriate government should have at least taken the pains of considering the failure report and reasons thereof before making a reference. Due “consideration” is a statutory requirement under section 12 of the Act. It has gone amiss.

27. If for improving the quality of tea etc., the workmen have to knock at the doors of justice, apparently, the Labour Department is not being able to protect the basic inherent and inviolable rights of the workmen. The aforesaid innocuous, insignificant demands should have been taken care of, at the inception. It should not have even been referred to the appropriate government, forget the Court. No endeavor whatsoever seems to have been made for settlement, nor any consideration was made while referring it for adjudication. The implementation and protection of Labour Laws do require some sensitized behavior and not a cursory glance, merely shifting the onus to this Court/Tribunal and that too summarily. It thus somehow reflects on the working of the State and the Department. Without adverting any further, suffice it to say that a copy of the award be sent to the appropriate government for effecting some remedial measures, if so desired. Accordingly, both these issues are answered in negative.

ISSUE NO. 3

28. In order to prove this issue, no specific evidence has been led from the side of the respondent which could go to show as to how the demand charter dated 29.3.2019 and subsequently reference sent by the appropriate government is not maintainable. Moreover, the demand charter dated 29.3.2019 was raised by the petitioner union under section 2-K of the Act whereupon the present reference has been received from the appropriate government for legal adjudication. I find no illegality in the demand charter dated 29.3.2019, and subsequent reference, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner union and against the respondent.

RELIEF

29. As a sequel to my above discussion and findings on issues no.1 to 3, the claim arising 16 points demand charter dated 29.3.2019, raised from the ofthe petitioner union is hereby answered in negative. The workers of petitioner union are not entitled to any relief. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette and a copy to Labour Commissioner, HP for effecting some remedial measures, in the matter, if so desired. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court on today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 124 of 2020
Instituted on : 24-07-2020
Decided on : 01-11-2022

Ram Krishan s/o Shri Dasu Ram, r/o Village Jadla, PO Kakar Hatti, Tehsil and District Solan HP through Shri JC Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P. . . *Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. M/s Golden Eagle Security Services, SCO 2475-76 Sector-22-C Chandigarh UT.
3. Satnam Singh Ahluwalia, Prop., Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (UT). . . *Respondents.*

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J.C. Bhardwaj, AR.
For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No.2 & 3 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Ram Krishan s/o Shri Dasu Ram, r/o Village Jadla, P.O. Kakar Hatti, Tehsil and District Solan H.P. w.e.f. 26.07.2019 by (I) M/s Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving

one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 -2019 and 2019 to 2020, and one month notice pay amounting to Rs. 57,083/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?"

2. To the fore, Shri Ram Krishan (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (hereinafter to be referred as respondent No.1), M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT (hereinafter to be referred as the respondent no.2) and Satnam Singh Ahluwalia, Prop., Golden Globe Industrial and Allied Services, SCO 866, Cabin No. 12-A, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (hereinafter referred to be as respondent No.3) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 05.03.1997 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the respondent no.2, where he worked till 2009 and thereafter his services were transferred on the rolls of respondent no.3, where he worked till his termination from service on 24.07.2019. Moreso, his legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of his services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principle employer on the rolls of non-existing contractors without his consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as security guard and doing the work pertaining to security arrangements. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during October, 2000 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

"Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e. HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 24.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs."

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee

of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 1997 by the company till his services were transferred on the rolls of respondents no. 2 & 3. The petitioner was engaged as Security Guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no. 3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no. 3, was no longer interested in extending the agreement, the respondent no.3, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that his services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of H.P. under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .OPP.

2. Whether the claim petition is not maintainable in the present form, as alleged? . . . *OPR*.

3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1 Decided accordingly.

Issue No. 2 No

Relief Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDING

ISSUE NO. 1

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity cards (PW-1/B) to (PW-1/D) and demand notice (PW-1/E).

16. In cross-examination, on behalf of respondent no.1, he has admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, he denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall

supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no. 2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolution (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. Per contra, Shri Vikas Chauhan, Ld. Counsel for the respondent no. 1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondents no. 2 & 3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no. 3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the

employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 05.03.1997 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2009. It is settled proposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 05.03.1997. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Golden Eagle Security Services. It is also established on record that the nature of employment is recorded as security guard, who was engaged on 15.10.2000 and had worked upto 31.03.2008. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no. 3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no. 2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

- (ii) **who is employed in the police service or as an officer or other employee of a prison; or**
- (iii) **who is employed mainly in a managerial or administrative capacity; or**
- (iv) **who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]**”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;**
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;**
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”**
- (c) termination of the service of a workman on the ground of continued ill-health”**

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of **H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737**, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of **Bangalore Water Supply and Sewerage Board vs. A. Rajappa and**

Ors. (1978) 2 SCC 2013. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations.”

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of “workman” as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a “workman” atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a “workman”. It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of “retrenchment” but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of “workman”. So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at

Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 57083/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, which provides as under:

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—**

(i) **one hundred and ninety days in the case of a workman employed below ground in a mine; and**

(ii) **two hundred and forty days, in any other case....”**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.3 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514),

Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e respondent no.2 and thereafter he was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruvulluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnatha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no. 2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no. 2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which

is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no. 3 i.e. Satnam Singh Ahluwalia, Prop., Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e. leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Reference Number : 126 of 2020
Instituted on : 20-07-2020
Decided on : 01-11-2022

Shiv Kumar s/o Shri Dhani Singh c/o Kishori Lal Bhardwaj, Village Gari, PO Solan, District Solan H.P. through Shri J.C. Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P.
Petitioner.

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. M/s Silvar Star Industrial and Allied Services SCO 2475-76, Sector-22-C Chandigarh UT.
3. Satnam Singh Ahluwalia, Prop. Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT).
..Respondents.

Reference under section 10 of the Industrial Disputes Act

For the Petitioner	:	Shri J. C. Bhardwaj, AR
For the Respondent No. 1	:	Shri Vikas Chauhan, Adv.
For the Respondent No. 2 & 3	:	Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, *vide* notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Shiv Kumar s/o Shri Dhani Singh C/o Kishori Lal Bhardwaj, Village Gari, PO Solan, District Solan, H.P. w.e.f. 26.07.2019 by (I) M/s Group Lease Network, SCO-866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 to 2019 and 2019 to 2020, and one month notice pay amounting to Rs. 42,248/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?”

2. To the fore, Shri Shiv Kumar (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Silvar Star Industrial and Allied Services SCO 2475-76, Sector-22-C Chandigarh UT (**hereinafter to be referred as the respondent no.2**) and Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (**hereinafter referred to be as respondent No. 3**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 15.10.2000 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the respondent no.2, where he worked till 2013 and thereafter his services were transferred on the rolls of respondent no.3, where he worked till his termination from service on 26.07.2019. Moreso, his legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of his services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principal employer on the rolls of non-existing contractors without his consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as security guard and doing the work pertaining to security arrangements. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation

and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during October, 2000 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 2000 by the company till his services were transferred on the rolls of respondents no. 2 & 3. The petitioner was engaged as Security Guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.2, was no longer interested in extending the agreement, the respondent no.2, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that his services were terminated illegally

without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . . *OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . . *OPR*.
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1 Decided accordingly

Issue No. 2 No

Relief Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO. 1.

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity card (PW-1/B), another identity card (PW-1/C) and demand notice (PW-1/D).

16. In cross-examination, on behalf of respondent no.1, he has admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card,

he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, he denied that initially he was engaged by the contractor Group Lease on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S. Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is

further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. Per contra, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondent no.3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 15.10.2000 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2007. It is settled proposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 15.10.2000. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Himachal Security Services. It is also established on record that the nature of employment is recorded as House Keeping, who was engaged on 15.10.2000 and had worked upto 31.03.2003. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or**
- (ii) who is employed in the police service or as an officer or other employee of a prison; or**
- (iii) who is employed mainly in a managerial or administrative capacity; or**
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”**

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;**
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;**
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”**
- (c) termination of the service of a workman on the ground of continued ill-health”**

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya*

vs. Sandoz (India) Ltd. (1997) 5 SCC 737, a Constitution Bench of the Hon'ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in *May & Baker*, *WIMCO* and *Bunnah Shell* cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon'ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations.”

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of “workman” as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite

wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 42,248/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall within the four corners of the definition of "retrenchment" as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in "continuous service" for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for

retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25-B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**
 - (ii) two hundred and forty days, in any other case...."**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the latter and spirit. The respondent no.2 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under: **"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd.,**

Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M. L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter he was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in

P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663 and Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of ₹ 1,00,000/- (₹ One lac) as **lump sum compensation** from the respondent no. 2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the peittioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present peittion, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the peittioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹1,00,000/- (one lac), to the workman, to be paid by the respondent no.3 i.e Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e. leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Reference Number : 127 of 2020
Instituted on : 20-07-2020
Decided on : 01-11-2022

Reena Alias Seema W/o Shri Pawan Kumar R/o Village Grai, PO Brewery, Tehsil and District Solan HP through Shri J.C. Bhardwaj, President H.P. AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P. . .*Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. M/s Golden Eagle Security Services, SCO 2475-76 Sector-22-C Chandigarh UT.
3. Satnam Singh Ahluwalia, Prop., M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (UT). . .*Respondents.*

Reference under section 10 of the Industrial Disputes Act

For the Petitioner	:	Shri J.C Bhardwaj, AR
For the Respondent No.1	:	Shri Vikas Chauhan, Adv.
For the Respondent No. 2 & 3	:	Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Smt. Reena Alias Seema w/o Shri Pawan Kumar R/o Village Grai, PO Brewery, Tehsil and District Solan, HP w.e.f. 26.07.2019 by (I) M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 -2019 and 2019 to 2020, and one month notice pay amounting to Rs. 44,604/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?”

2. To the fore, Smt. Reena Alias Seema (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT (**hereinafter to be referred as the respondent no.2**) and M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (UT) (**hereinafter referred to be as respondent No.3**), under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that she was engaged during the year 2003 by the respondent no.1 and remained there till her services were illegally transferred on the rolls of the

respondent no.2, where she worked till 2007 and thereafter her services were transferred on the rolls of respondent no.3, where she worked till her termination from service on 26.07.2019. Moreso, her legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of her services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principal employer on the rolls of non-existing contractors without her consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as safai karamchari and doing the work pertaining to cleaning. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work as safai karamchari during 1998 to 26.07.2019, when her services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during her service tenure, as such she has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to her.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e. HFCL Ltd. Chambaghat with retrospective effect i.e from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 2003 by the company till her services were transferred on the rolls of respondents no.2 & 3. The petitioner was engaged as safai karamchari with the respondent no.1, in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.3, was no longer interested in extending the agreement, the respondent no.3, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that she would be paid full and final settlement amount and was asked to report at Head Office in order to deployment to other unit but she refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that her services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR*.
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Decided accordingly

Issue No. 2 No

Relief. Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO. 1.

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence her sworn in affidavit (PW-1/A), wherein she reiterated almost all the averments as made in the claim petition. She also tendered into evidence identity cards (PW-1/B) to (PW-1/D) and demand notice (PW-1/E).

16. In cross-examination, on behalf of respondent no.1, she has admitted that no appointment letter was issued by the respondent no.1. She further admitted that expect identity card, she has not placed any document to prove that he was engaged by respondent no.1. She denied that the salary was paid by the contractor. She admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. She denied that there was no direct link between her services and the respondent no.1. She admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, she denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. She admitted her signatures on form-B Mark RX-1. She denied that after engagement, the contractor had deployed him with HFCL. She denied that she was asked to appear at Chandigarh office. She denied that all her dues were credited in her account on 25.07.2019. She denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondents no. 2 & 3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that her services were engaged during 2003 by the principal employer directly and she remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2007. It is settled preposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that she was initially engaged by the principal employer during 2003. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Golden Eagle Security Services. It is also established on record that the nature of employment is recorded as safai karamchari, who was engaged on 01.07.2007 and had worked upto 31.03.2012. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final

settlement amount by the contractor i.e respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before adverting to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

- “2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
 - (ii) who is employed in the police service or as an officer or other employee of a prison; or
 - (iii) who is employed mainly in a managerial or administrative capacity; or
 - (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman

concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;"

- (c) termination of the service of a workman on the ground of continued ill-health"

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question "who is a workman" has been well settled by various judgments of the Hon'ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd.* (1997) 5 SCC 737, a Constitution Bench of the Hon'ble Supreme Court has held as under:

"..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation."

31. Again their Lordship of Hon'ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors.* (1978) 2 SCC 2013. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

"The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesi, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and

workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations."

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but she refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 44604/- towards her entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall within the four corners of the definition of "retrenchment" as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, she is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, which provides as under:

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in "continuous service" for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25-B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of her retrenchment, her services could not have been terminated unless she was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.3 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under: **"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."**

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e respondent no.2 and thereafter she was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the

respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiyah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the peittioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present peittion, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the peittioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.3 i.e Satnam Singh Ahluwalia, Prop., M/s Group Lease Network, SCO 866, First Floor, NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 128 of 2020
Instituted on : 20-07-2020
Decided on : 01-11-2022.

Anita w/o Shri Sanjay Kumar r/o Ram Nagar Colony Adarsh Nagar, Dhobi Ghat Ward No.7
Solan, Tehsil and District Solan, HP through Shri JC Bhardwaj, President HP AITUC, HQ D-1,
3rd Floor, City Centre Plaza, Solan, H.P. . .*Petitioner* .

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire Line/Wireless Division),
Electronic Complex, Chambaghat, Solan.
2. M/s Golden Eagle Security Services, SCO 2475-76 Sector-22-C Chandigarh UT
3. M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra,
Chandigarh (UT). . .*Respondents*.

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J.C Bhardwaj, AR
For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No. 2 & 3 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Smt. Anita w/o Shri Sanjay Kumar, r/o Ram Nagar Colony Adarsh Nagar, Dhobi Ghat Ward No.7 Solan Tehsil and District Solan, HP w.e.f. 26.07.2019 by (I) M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer),

after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 -2019 and 2019 to 2020, and one month notice pay amounting to Rs. 44,188/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?"

2. To the fore, Smt. Anita (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT (**hereinafter to be referred as the respondent no.2**) and M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (UT) (**hereinafter referred to be as respondent No.3**), under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that she was engaged on 01.01.1998 by the respondent no.1 and remained there till her services were illegally transferred on the rolls of the respondent no.2, where she worked till 2004 and thereafter her services were transferred on the rolls of respondent no.3, where she worked till her termination from service on 26.07.2019. Moreso, her legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of her services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principal employer on the rolls of non-existing contractors without her consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as safai karamchari and doing the work pertaining to cleaning. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work as safai karamchari during 1998 to 26.07.2019, when her services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during her service tenure, as such she has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to her.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

"Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs."

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 1998 by the company till her services were transferred on the rolls of respondents no.2 & 3. The petitioner was engaged as safai karamchari with the respondent no.1, in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.3, was no longer interested in extending the agreement, the respondent no.3, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that she would be paid full and final settlement amount and was asked to report at Head Office in order to deployment to other unit but she refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that her services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .OPP.

2. Whether the claim petition is not maintainable in the present form, as alleged? . . . *OPR*.

3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Decided accordingly

Issue No. 2 No

Relief. Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO.1

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence her sworn in affidavit (PW-1/A), wherein she reiterated almost all the averments as made in the claim petition. She also tendered into evidence identity card (PW-1/B) and demand notice (PW-1/C).

16. In cross-examination, on behalf of respondent no.1, she has admitted that no appointment letter was issued by the respondent no.1. She further admitted that expect identity card, she has not placed any document to prove that he was engaged by respondent no.1. She denied that the salary was paid by the contractor. She admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. She denied that there was no direct link between her services and the respondent no.1. She admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, she denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. She admitted her signatures on form-B Mark RX-1. She denied that after engagement, the contractor had deployed him with HFCL. She denied that she was asked to appear at Chandigarh office. She denied that all her dues were credited in her account on 25.07.2019. She denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondents no. 2 & 3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that her services were engaged on 01.01.1998 by the principal employer directly and she remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2004. It is settled preposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that she was initially engaged by the principal employer on 21.01.2005. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Golden Eagle Security Services. It is also established on record that the nature of employment is recorded as safai karamchari, who was engaged on 01.01.1998 and had worked upto 31.03.2012. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

- “2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
 - (ii) who is employed in the police service or as an officer or other employee of a prison; or
 - (iii) who is employed mainly in a managerial or administrative capacity; or

- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(o) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the

institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations."

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but she refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 44188/- towards her entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall

within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, she is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

36. Since, the petitioner is proved to have completed more than 240 days during the period

of twelve calendar months in the preceding year from the date of her retrenchment, her services could not have been terminated unless she was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.3 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the

natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in *M. L. Binjolkar v. State of M.P.* (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter she was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnatha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of

₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no. 3 i.e. Satnam Singh Ahluwalia, Prop., M/s Group Lease Network, SCO 866, First Floor, NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, the petitioner is entitled for all his legal dues i.e leave encashment, EPF, ESI etc., admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 141 of 2020
Instituted on : 17-07-2020
Decided on : 01-11-2022

Kanshi Ram s/o Shri Shankar Dass C/o Bidhi Ram, Village Krot Bihar, P.O. Chambaghat, District Solan, HP through Shri J.C. Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P. . *Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT). . *Respondents.*

Reference under section 10 of the Industrial Disputes Act.

For the Petitioner : Shri J. C. Bhardwaj, AR
For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No.2 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Kanshi Ram s/o Shri Shankar Dass C/o Bidhi Ram Village Krol Bihar, P.O. Chambaghat, District Solan, HP w.e.f. 26.07.2019 by (I) M/s Group Lease Network, SCO-866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the final year 2018 to 2019 and 2019 to 2020, and one month notice pay amounting to Rs. 49,876/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to ?”

2. To the fore, Shri Kanshi Ram (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**) and Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (**hereinafter referred to be as respondent No.2**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 02.06.2010 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the contractor, where he worked till his termination from service on 26.07.2019. Moreso, his legitimate dues were neither paid by the contractor nor the respondent no.1 at the time of termination of his services. The contractor was only name lender contractor as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principle employer on the rolls of non-existing contractor without his consent. The so call contractor paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as Gardener (Mali) and doing the work of gardening. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during the month of June 2010 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged on 02.06.2010 by the company till his services were transferred on the rolls of respondent no.2. The petitioner was engaged as Mali with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractor. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the respondent no.2 had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondent no.2 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondent No.1 and 2. The petitioner is the employee of respondent no.2, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.2 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.2, was no longer interested in extending the agreement, the respondent no.2, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.2. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.2. It is denied that his services were terminated illegally without any justification. It is submitted that the respondent had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR*.
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1 Decided accordingly

Issue No. 2 No

Relief. Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO. 1.

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity card (PW-1/B) and demand notice (PW-1/C).

16. In cross-examination, on behalf of respondent no.1, he has admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.2, he denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A),

wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractor.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondent no.2, has

contended that since the respondent no.2, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.2 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.2 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 2.6.2010 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2013. It is settled preposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 2.6.2010. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Shri Satnam Singh. It is also established on record that the nature of employment is recorded as Mali, who was engaged on 01.04.2013 and had worked upto 31.12.2017. It is also established on record that a valid licence was issued in the name of respondent no.2, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.2 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.2, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.2 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]"

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.2. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the

teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations."

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 24.07.2019, is violative of the provisions of the Act. It is the case of respondent no.2, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 49,876/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.2 in any manner. It is also admitted position on record that the contractor while

terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.2, while terminating the services of the petitioner has to fall within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**

(ii) two hundred and forty days, in any other case....”

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not

find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in *M.L. Binjolkar v. State of M.P.* (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter he was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no. 1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.2 i.e. Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e. leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 142 of 2020
Instituted on : 24-07-2020
Decided on : 01-11-2022

Pawan Kumar s/o Shri Brij Lal, r/o Village Gari, PO Solan, District Solan H.P. through
Shri J.C. Bhardwaj, President H.P. AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P.

. .Petitioner .

VERSUS

1. M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division),
Electronic Complex, Chambaghat, Solan.
2. M/s Golden Eagle Security Services, SCO 2475-76, Sector 22-C Chandigarh (UT).
3. Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik
Enclave NAC, Manimajra, Chandigarh (UT).
. .Respondents.

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J.C. Bhardwaj, AR

For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No. 2 & 3 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Pawan Kumar s/o Shri Brij Lal r/o, Village Gari, P.O. Solan, District Solan HP w.e.f. 26.07.2019 by (I) M/s Group Lease Network, SCO-866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 to 2019 and 2019 to 2020, and one month notice pay amounting to Rs. 44094/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?”

2. To the fore, Shri Pawan Kumar (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Golden Eagle Security Services, SCO 2475-76, Sector 22-C Chandigarh (UT) (**hereinafter to be referred as the respondent no.2**) and Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (**hereinafter referred to be as respondent No.3**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 15.10.2000 by the respondent no. 1 and remained there till his services were illegally transferred on the rolls of the respondent no. 2, where he worked till 2012 and thereafter his services were transferred on the rolls of respondent no. 3, where he worked till his termination from service on 26.07.2019. Moreso, his legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of his services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principle employer on the rolls of non-existing contractors without his consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as Safai Karamchari and doing the work pertaining to cleanliness of the company. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in house keeper during October, 2012 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily

terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 2000 by the company till his services were transferred on the rolls of respondents no.2 & 3. The petitioner was engaged as Security Guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no. 3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.2, was no longer interested in extending the agreement, the respondent no.2, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that his services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be

termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.

2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR*.

3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Decided accordingly

Issue No. 2 No

Relief Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO. 1:

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity card (PW-1/B), identity cards (PW-1/C) & (PW-1/D) and demand notice (PW-1/E).

16. In cross-examination, on behalf of respondent no.1, he has admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He

denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, he denied that initially he was engaged by the contractor Group Lease on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior

permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. Per contra, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondent no.3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no. 3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 15.10.2000 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2007. It is settled proposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 15.10.2000. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Golden Eagle Security Services. It is also established on record that the nature of employment is recorded as Safai Karamchari, who was engaged on 01.09.2007 and had worked upto 31.03.2012. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

- “2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
 - (ii) who is employed in the police service or as an officer or other employee of a prison; or
 - (iii) who is employed mainly in a managerial or administrative capacity; or
 - (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as:

- “Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—
- (a) voluntary retirement of the workman;
 - (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
 - (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
 - (c) termination of the service of a workman on the ground of continued ill-health”

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench

decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in *May & Baker*, *WIMCO* and *Bunnah Shell* cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors.* (1978) 2 SCC 2013. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations.”

32. A perusal of the above mentioned two judgments of the Hon’ble Supreme Court would clearly established that the definition of “workman” as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a “workman” atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a

“workman”. It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of “retrenchment” but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of “workman”. So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 42,248/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no. 3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**
 - (ii) two hundred and forty days, in any other case....”**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.2 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu

of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e respondent no.2 and thereafter he was deployed with HPPCL i.e respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case

in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no. 2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the peittioner pursuant to reference recevied from the appropriate government for legal adjudication. I find no illegality in the present peittion, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the peittioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.3 i.e Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 143 of 2020
Instituted on : 24-07-2020
Decided on : 01-11-2022

Chuni Lal s/o Shri Sohan Lal, r/o VPO Salogra, Tehsil & District Solan, HP through Shri J.C. Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P.

.Petitioner.

VERSUS

1. M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.

2. M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT.

3. Satnam Singh Ahluwalia, Prop., Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (UT).

.Respondents.

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J. C. Bhardwaj, AR
For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No.2 & 3 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Chuni Lal s/o Shri Sohan Lal, r/o VPO Salogra, Tehsil & District Solan, HP w.e.f. 26.07.2019 by (I) M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 -2019 and 2019 to 2020, and one month notice pay amounting to Rs. 54,105/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?”

2. To the fore, Shri Chuni Lal (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT (**hereinafter to be referred as the respondent no.2**) and Satnam Singh Ahluwalia, Prop., Golden Globe Industrial and Allied Services, SCO 866, Cabin No. 12-A, First Floor, Shivalik Enclave

NAC, Manimara, Chandigarh (UT) (**hereinafter referred to be as respondent No.3**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 28.6.2007 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the respondent no. 2, where he worked till 31.3.2012 and thereafter his services were transferred on the rolls of respondent no. 3, where he worked till his termination from service on 26.07.2019. Moreso, his legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of his services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principle employer on the rolls of non-existing contractors without his consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as security guard and doing the work pertaining to security arrangements. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during October, 2000 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 2000 by the company till his services were transferred on the rolls of respondents no.2 & 3. The petitioner was engaged as Security Guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who

use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.3, was no longer interested in extending the agreement, the respondent no.3, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that his services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR*.
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1	Decided accordingly.
Issue No. 2	No.
Relief	Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO.1

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity card (PW-1/B), and demand notice (PW-1/C).

16. In cross-examination, on behalf of respondent no.1, he has admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, he denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the

petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. Per contra, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondents no. 2 & 3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 28.06.2007 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2009. It is settled preposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 28.6.2007. In order to discharge the onus, the petitioner had mainly relied upon the documentary

proof i.e identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Golden Eagle Security Services. It is also established on record that the nature of employment is recorded as security guard, who was engaged on 01.05.2009 and had worked upto 31.03.2003. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no. 2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

- “2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
 - (ii) who is employed in the police service or as an officer or other employee of a prison; or
 - (iii) who is employed mainly in a managerial or administrative capacity; or
 - (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of **H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737**, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of **Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013**. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesi, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the

University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations."

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 54,105/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall within the four corners of the definition of "retrenchment" as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in "continuous service" for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25-B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**
 - (ii) two hundred and forty days, in any other case...."**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.3 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

43. In the instant case, the petitioner was engaged by contractor i.e respondent no.2 and thereafter he was deployed with HPPCL i.e respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon’ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiyah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon’ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.3 i.e Satnam Singh Ahluwalia, Prop., Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides

lump sum compensation, **the petitioner is entitled for all his legal dues i.e leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 144 of 2020
Instituted on : 25-07-2020
Decided on : 01-11-2022

Kamlesh Kumar s/o Shri Gopal Dass, r/o Village Chiknahat, P.O. Sardaghat, Tehsil Kandaghat, District Solan, HP through Shri JC Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P. . *Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. Satnam Singh Ahluwalia, Prop., M/s Golden Globe Industrial and Allied service SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh-160101. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J.C. Bhardwaj, AR
For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No. 2 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Kamlesh Kumar s/o Shri Gopal Dass, r/o Village Chiknahat, PO Sardaghat, Tehsil Kandaghat, District

Solan, HP w.e.f. 26.07.2019 by (I) M/s Golden Globe Industrial and Allied service SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh-160101 (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the final year 2018 to 2019 and 2019 to 2020, and one month notice pay amounting to Rs. 54,304/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?"

2. To the fore, Shri Kamlesh Kumar (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**) and Satnam Singh Ahluwalia, Prop., M/s Golden Globe Industrial and Allied service SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh-160101 (**hereinafter referred to be as respondent No.2**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 24.10.2003 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the contractor, where he worked till his termination from service on 26.07.2019. Moreso, his legitimate dues were neither paid by the contractor nor the respondent no.1 at the time of termination of his services. The contractor was only name lender contractor as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principle employer on the rolls of non-existing contractor without his consent. The so call contractor paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as Security Guard and doing the work of security arrangements. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during the month of June 2010 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

"Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs."

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged on 02.06.2010 by the company till his services were transferred on the rolls of respondent no.2. The petitioner was engaged as security guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractor. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the respondent no.2 had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondent no.2 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondent No.1 and 2. The petitioner is the employee of respondent no.2, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.2 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.2, was no longer interested in extending the agreement, the respondent no.2, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.2. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.2. It is denied that his services were terminated illegally without any justification. It is submitted that the respondent had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .OPP.

2. Whether the claim petition is not maintainable in the present form, as alleged? ..*OPR*.

3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Decided accordingly

Issue No. 2 No.

Relief. Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO.1

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity card (PW-1/C) and demand notice (PW-1/D).

16. In cross-examination, on behalf of respondent no.1, he admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.2, he denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractor.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. Per contra, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of security guard with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondent no.2, has contended that since the respondent no.2, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.2 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.2 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 2.6.2010 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2013. It is settled preposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 2.6.2010. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Shri Satnam Singh. It is also established on record that the nature of employment is recorded as security guard, who was engaged on 01.04.2013 and had worked upto 31.12.2017. It is also established on record that a valid licence was issued in the name of respondent no.2, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.2 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.2, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.2 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or**
- (ii) who is employed in the police service or as an officer or other employee of a prison; or**
- (iii) who is employed mainly in a managerial or administrative capacity; or**

- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”

(c) termination of the service of a workman on the ground of continued ill-health”

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.2. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in *May & Baker*, *WIMCO* and *Bunnah Shell* cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the

Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesi, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations."

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 24.07.2019, is violative of the provisions of the Act. It is the case of respondent no.2, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 49,876/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.2 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.2, while terminating the services of the petitioner has to fall

within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**
 - (ii) two hundred and forty days, in any other case....”**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the

natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in *M.L. Binjolkar v. State of M.P.* (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter he was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnatha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no. 2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.2 i.e. Satnam Singh Ahluwalia, Prop., M/s Golden Globe Industrial and Allied service SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh-160101 (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e. leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 145 of 2020
Instituted on : 25-07-2020
Decided on : 01-11-2022

Narender Kumar s/o Shri Baldev Chand c/o shri K. D. Sharma, Village Giarai, P.O. Solan Brewery, District Solan, H.P. through Shri J.C. Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P. . .*Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT). . .*Respondents.*

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J.C Bhardwaj, AR
For the Respondent No.1 : Shri Vikas Chauhan, Adv
For the Respondent No. 2 : Shri Sameer Thakur, Adv

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Narender Kumar S/o Shri Baldev Chand C/o shri K.D Sharma, Village Giarai, PO Solan Brewery, District solan, H.P. w.e.f. 26.07.2019 by (I) M/s Group Lease Network, SCO-866, First Floor, Shivalik Enclave NAC, Manimjara, Chandigarh (UT) (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the final year 2018 to 2019 and 2019 to 2020, and one month notice pay amounting to Rs. 51,520/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?”

2. To the fore, Shri Narender Kumar (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**) and Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimjara, Chandigarh (UT) (**hereinafter referred to be as respondent No.2**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 16.10.2003 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the contractor, where he worked till his termination from service on 26.07.2019. Moreso, his legitimate dues were neither paid by the contractor nor the respondent no.1 at the time of termination of his services. The contractor was only name lender contractor as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principle employer on the rolls of non-existing contractor without his consent. The so call contractor paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as Security Guard and doing the work of security arrangements. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during the month of June 2010 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged on 02.06.2010 by the company till his services were transferred on the rolls of respondent no.2. The petitioner was engaged as security guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractor. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the respondent no.2 had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of H.P. The respondent no.2 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondent No.1 and 2. The petitioner is the employee of respondent no.2, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.2 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.2, was no longer interested in extending the agreement, the respondent no.2, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.2. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.2. It is denied that his services were terminated illegally without any justification. It is submitted that the respondent had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR*.
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1 Decided accordingly

Issue No. 2 No

Relief. Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO.1.

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence ESI card (PW-1/B), identity card (PW-1/C) and demand notice (PW-1/D).

16. In cross-examination, on behalf of respondent no.1, he admitted that as per his ESI card (PW-1/B), his employer is referred as Himachal Security Services. He further admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.2, he denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A),

wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractor.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of security guard with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondent no.2, has contended that since the respondent no.2, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.2 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.2 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 2.6.2010 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2013. It is settled preposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 2.6.2010. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Shri Satnam Singh. It is also established on record that the nature of employment is recorded as security guard, who was engaged on 01.04.2013 and had worked upto 31.12.2017. It is also established on record that a valid licence was issued in the name of respondent no.2, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.2 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.2, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.2 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.2. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz.manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by

either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations.”

32. A perusal of the above mentioned two judgments of the Hon’ble Supreme Court would clearly established that the definition of “workman” as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a “workman” atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a “workman”. It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of “retrenchment” but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of “workman”. So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 24.07.2019, is violative of the provisions of the Act. It is the case of respondent no.2, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 49,876/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.2 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.2, while terminating the services of the petitioner has to fall within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) **the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) **the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) **notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) **a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) **where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service**

under an employer-

(a) **for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—**

(i) **one hundred and ninety days in the case of a workman employed below ground in a mine; and**

(ii) **two hundred and forty days, in any other case....”**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the latter and spirit. The respondent did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter he was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnatha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no. 2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no. 2 i.e Satnam Singh Ahluwalia, Prop., Group Lease Network, SCO 866, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 146 of 2020
Instituted on : 25-07-2020
Decided on : 01-11-2022

Dharam Pal s/o Shri Mast Ram, r/o Village Mansar, PO Salogra Tehsil and District Solan, HP through Shri J.C. Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, HP. .*Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. M/s Golden Eagle Security Services, SCO 2475-76 Sector-22-C Chandigarh UT.
3. Satnam Singh Ahluwalia, Prop., Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (UT). . . Respondents.

Reference under section 10 of the Industrial Disputes Act

For the Petitioner	:	Shri J.C Bhardwaj, AR
For the Respondent No.1	:	Shri Vikas Chauhan, Adv
For the Respondent No.2 & 3	:	Shri Sameer Thakur, Adv

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.07.2020, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of contract worker Shri Dharam Pal s/o Shri Mast Ram, r/o Village Mansar, PO Salogra Tehsil and District Solan, HP w.e.f. 26.07.2019 by (I) M/s Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (contractor) and (II) the Factory Manager, M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), after giving one month notice by the above contractor to above principal employer to terminate contract agreement between them which was duly accepted by the principal employer and consequently above contract worker was offered either alternate employment or full and final which includes gratuity, leave encashment, bonus for the financial year 2018 -2019 and 2019 to 2020, and one month notice pay amounting to Rs. 57,250/- only as full & final, and after not rejecting the letter by the contract worker, is proper and justified? If not, to what relief the above said contract worker is entitled to?”

2. To the fore, Shri Dharam Pal (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Golden Eagle Security Services, SCO 2, 475-76 Sector-22-C Chandigarh UT (**hereinafter to be referred as the respondent no.2**) and Satnam Singh Ahluwalia, Prop., Golden Globe industrial and Allied Services, SCO 866, Cabin No. 12-A, First Floor, Shivalik Enclave NAC, Manimajra, Chandigarh (UT) (**hereinafter referred to be as respondent No.3**) under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that he was engaged on 21.01.2005 by the respondent no.1 and remained there till his services were illegally transferred on the rolls of the respondent no.2, where he worked till 2009 and thereafter his services were transferred on the rolls of respondent no.3, where he worked till his termination from service on 24.07.2019. Moreso, his legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of his services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was

transferred by the principal employer on the rolls of non-existing contractors without his consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as security guard and doing the work pertaining to security arrangements. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work in Security Department during October, 2000 to 26.07.2019, when his services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during his service tenure, as such he has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to him.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e. HFCL Ltd. Chambaghat with retrospective effect i.e from the date of his illegal removal/termination on 26.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 2005 by the company till his services were transferred on the rolls of respondents no.2 & 3. The petitioner was engaged as Security Guard with the respondent no.1 in accordance with service provide agreement executed between the principal employer and the contractors. There was no employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 & 3 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.3, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondent no.3 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondent no.3, was no longer interested in extending the agreement, the respondent no.3, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that he would be paid full and final settlement amount and was asked to report at Head Office by 30.07.2019 in order to deployment to other unit but he refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3. It is denied that his services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR* .
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Decided accordingly

Issue No. 2 No

Relief Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO.1

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered into evidence identity cards (PW-1/B) & (PW-1/C), demand notice (PW-1/E) and EPF slips (PW-1/E-1) to (PW-1/E-8).

16. In cross-examination, on behalf of respondent no.1, he has admitted that no appointment letter was issued by the respondent no.1. He further admitted that expect identity card, he has not placed any document to prove that he was engaged by respondent no.1. He denied that the salary was paid by the contractor. He admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. He denied that there was no direct link between his services and the respondent no.1. He admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, he denied that initially he was engaged by the contractor Golden Globe on 01.04.2013. He admitted his signatures on form-B Mark RX-1. He denied that after engagement, the contractor had deployed him with HFCL. He denied that he was asked to appear at Chandigarh office. He denied that all his dues were credited in his account on 25.07.2019. He denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, respondent no.2, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J. C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment

compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondents no. 2 & 3, has contended that since the respondent no.3, was no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.3 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.3 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that his services were engaged on 21.01.2005 by the principal employer directly and he remained in service till his services were illegally transferred on the rolls of name lender contractor in the year 2009. It is settled proposition of law that the initial burden lies on the party who alleges the same, therefore, it is the bounden duty of the petitioner to prove the fact that he was initially engaged by the principal employer on 21.01.2005. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e. identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Golden Eagle Security Services. It is also established on record that the nature of employment is recorded as security guard, who was engaged on 01.05.2009 and had worked upto 31.03.2012. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the respondent no.3, and definitely he was the employee of respondent no.2 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.3 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or**
- (ii) who is employed in the police service or as an officer or other employee of a prison; or**
- (iii) who is employed mainly in a managerial or administrative capacity; or**
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”**

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;**
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;**
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”**
- (c) termination of the service of a workman on the ground of continued ill-health”**

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of **H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737**, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in *May & Baker*, *WIMCO* and *Bunnah Shell* cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of ***Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013***. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations.”

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 26.07.2019, is violative of the provisions of the Act. It is the case of respondent no.3, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but he refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 57250/- towards his entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.3 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.3, while terminating the services of the petitioner has to fall within the four corners of the definition of "retrenchment" as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, he is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**
 - (ii) two hundred and forty days, in any other case....”**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month’s mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.3 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon’ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon’ble Supreme Court observed as under:

“10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal.”

39. Similarly, Their Lordship of Hon’ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon’ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

“The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages.”

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter he was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly,

where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiyah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.2.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.3 i.e Satnam Singh Ahluwalia, Prop., Golden Globe Industrial & Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC, Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement** of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman. This apart, it is expressly made clear that besides lump sum compensation, **the petitioner is entitled for all his legal dues i.e. leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 148 of 2019
Instituted on : 13-11-2019
Decided on : 01-11-2022

Poonam Sharma w/o Shri Ramesh Sharma r/o Opposite HFCL Wireline Division Basal Road, PO Chambaghat, Tehsil and District Solan, HP through Shri JC Bhardwaj, President HP AITUC, HQ D-1, 3rd Floor, City Centre Plaza, Solan, H.P. . *Petitioner.*

VERSUS

1. M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan.
2. M/s Golden Eagle Security Services, SCO 2475-76, Sector 22-C Chandigarh.
3. Satnam Singh Ahluwalia, M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (UT).
4. M/s Golden Globe Industrial and Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act

For the Petitioner : Shri J. C. Bhardwaj, AR
For the Respondent No.1 : Shri Vikas Chauhan, Adv.
For the Respondent No.3 & 4 : Shri Sameer Thakur, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government, vide notification dated 13.10.2019, under section 10 of the Industrial Disputes Act, 1947 (**hereinafter referred to be as the Act**), for its legal adjudication, which reads as under:

“Whether the termination of the services of Smt. Poonam Sharma w/o Shri Ramesh Sharma, r/o Opposite HFCL Wireline Division Basal Road, PO Chambaghat, Tehsil and District Solan, HP w.e.f. 24.07.2019 by (i) M/s Golden Globe Industrial and Allied Services SCO 866, Cabin No. 12-A, First Floor NAC Manimajra, Chandigarh (Contractor) (ii) Shri Satnam Singh Ahluwalia M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (contractor) and (iii) the Factory Manager, M/s Himachal Futuristic Communications Ltd. (Wire line/Wireless Division), Electronic Complex, Chambaghat, Solan (principal employer), without complying with the provisions of the industrial disputes Act, 1947, is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above workers is entitled to from the above employer/management?”

2. To the fore, Smt. Poonam Sharma (hereinafter to be referred as the petitioner) has instituted the claim petition against M/s Himachal Futuristic Communications Ltd., (Wire

line/Wireless Division), Electronic Complex, Chambaghat, Solan (**hereinafter to be referred as respondent No.1**), M/s Golden Eagle Security Services, SCO 2475-76, Sector 22-C Chandigarh (**hereinafter to be referred as the respondent no.2**) Shri Satnam Singh Ahluwalia, M/s Group Lease Network, SCO 866, First Floor, Shivalik Enclave, NAC, Manimajra, Chandigarh (UT) (**hereinafter to be referred as the respondent no.3**) and M/s M/s Golden Globe Industrial and Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh (**hereinafter referred to be as respondent No.4**), under the provisions of the Act.

3. Key facts necessary for the disposal of the present reference petition as alleged by the petitioner in the statement of claim are thus that she was engaged on 09.03.2004 by the respondent no.1 and remained there till her services were illegally transferred on the rolls of the respondent no.2, where she worked till 2012 and thereafter her services were transferred on the rolls of respondents no.3 and 4, where she worked till her termination from service on 24.07.2019. Moreso, her legitimate dues were neither paid by the contractors nor the respondent no.1 at the time of termination of her services. The contractors were only name lender contractors as such the contract was sham, not genuine, camouflage and bogus for all purposes. The name of the workman was transferred by the principal employer on the rolls of non-existing contractors without her consent. The so call contractors paid some amount to the worker which was received by the worker under protest subject to lawful payments.

4. Further, it is submitted that the petitioner was working as Crech care taker and doing the work pertaining to crech service. The work which was performed by the petitioner is permanent in nature and has to stay till the survival of the company as the work is perennial in nature, hence, the services of the petitioner shown to be on the rolls of the so called contractor amounted to unfair labour practice prohibited under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 as the petitioner remained continued to work as crech care taker during 2004 to 24.07.2019, when her services were illegally, unlawfully and arbitrarily terminated by the name lender contractor as well as by the principal employer. The petitioner had worked continuously and completed 240 working days in each calendar year during her service tenure, as such she has rendered continuous service for the purpose of section 25-B of the Act. The services of the petitioner were terminated without paying any retrenchment compensation as per the provisions of section 25-F and 25-N of the Act, but one month's wages in lieu of notice has been paid to her.

5. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“Now, it is therefore, prayed that your honour may kindly be pleased to award reinstatement to the petitioner/workman in the employment of the respondent No.1 i.e HFCL Ltd. Chambaghat with retrospective effect i.e. from the date of his illegal removal/termination on 24.07.2019 with full back-wages, seniority and other consequential service benefits throughout and with costs.”

6. The lis was resisted and contested by respondent No.1 by filing written reply on inter-alia preliminary objections of maintainability, not an employee of respondent no.1, being employee of contractor duly registered under Contract Labour (Regulation and Abolition) Act, 1970 and the replying respondent is duly registered under the Contract Labour, Act vide certificate dated 29.09.1997.

7. On merits, it is denied that the petitioner workman was ever engaged in the year 2004 by the company till her services were transferred on the rolls of respondents no.2 to 4. The petitioner was engaged as crech care taker with the respondent no.1, in accordance with service provide agreement executed between the principal employer and the contractors. There was no

employee employer relationship between the parties. The principal employer had no control over the service conditions of the petitioner. As per service provider agreement, the contractors had been granted licence to run the business of housekeeping, loading/unloading, gardening and other misc. allied services by the Government of HP. The respondents no.2 to 4 had been granted licence, who use to pay monthly wages as well as other statutory benefits to the petitioner. The workman is also covered under EPF and ESI Schemes. It is denied that the work was permanent in nature and was outside the scope of contract entered between respondents. The petitioner is the employee of respondent no.4, for all purposes. It is therefore prayed that the reference as well as the statement of claim in the said regard of the petitioner workman be dismissed with heavy costs in the interest of justice and fair play.

8. Reply on behalf of respondents no.3 & 4 to the statement of claim has also been filed on inter-alia preliminary objections of maintainability, cause of action, obtained permission to engage the contract labour and agreement to provide the manpower to respondent no.1.

9. On merits, it is submitted that since the respondents no.3 & 4, were no longer interested in extending the agreement, the respondents no.3 & 4, vide notice dated 20.07.2019, duly informed about the termination of contract agreement to the petitioner. The replying respondent also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. The petitioner was further informed that she would be paid full and final settlement amount and was asked to report at Head Office in order to deployment to other unit but she refused the same. The petitioner was paid full & final settlement amount including one month's wages by the respondent no.3 & 4. It is denied that the services of the petitioner were illegally transferred on the rolls of respondent no.3 & 4. It is denied that her services were terminated illegally without any justification. It is submitted that the respondents had been granted licence to engage the contract labour by the Government of HP under Contract Labour (Regulation and Abolition) Act, 1970. It is further submitted that the discontinuation of the services of the petitioner cannot be termed as termination under section 25-F of the Act. It is also submitted that the present case is not a case of disciplinary action, therefore, conducting of domestic enquiry does not come into play. It is therefore prayed that in the light of the aforesaid submissions the present claim petition be dismissed with cost and any other order in favour of the replying respondent may kindly be passed in the interest of justice.

10. While filing rejoinder, the petitioner controverted the averments made thereto in the replies filed by respondents and reaffirmed and reiterated those raised in the claim petition.

11. On elucidating the pleading of parties, the following issues were struck down by this Tribunal, for its final determination, vide zimni order dated 06.06.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent after giving one month's notice by the contractor to above principal employer to terminate contract agreement between them, is illegal and unjustified as alleged? If yes, what relief the petitioner is entitled to? . . .*OPP*.
2. Whether the claim petition is not maintainable in the present form, as alleged? . . .*OPR* .
3. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Decided accordingly.

Issue No. 2 No

Relief Reference is partly allowed awarding lump sum compensation to the petitioner.

REASONS FOR FINDINGS

ISSUE NO.1.

15. In order to substantiate its case, the petitioner has appeared in the witness box as (PW-1) and tendered into evidence her sworn in affidavit (PW-1/A), wherein she reiterated almost all the averments as made in the claim petition. She also tendered into evidence identity cards (PW-1/B) & (PW-1/C) and identity card Mark PX.

16. In cross-examination, on behalf of respondent no.1, she has admitted that no appointment letter was issued by the respondent no.1. She further admitted that expect identity card, she has not placed any document to prove that he was engaged by respondent no.1. She denied that the salary was paid by the contractor. She admitted that the respondent no.1 is registered with the Government to engage contract labour under Contract Labour (Regulation and Abolition) Act. She denied that there was no direct link between her services and the respondent no.1. She admitted that the name of the contractor has been shown in the identity card.

17. When cross-examined on behalf of respondent no.3, she denied that initially he was engaged by the contractor Golden Globe on 01.11.2015. She admitted her signatures on form-B Mark RX-1. She denied that after engagement, the contractor had deployed him with HFCL. She denied that she was asked to appear at Chandigarh office. She denied that all her dues were credited in her account on 25.07.2019. She denied to have abandoned his job.

18. In order to rebut, the respondent No.1 has examined Shri G.S. Rana, Manager, HR of the respondent company as (RW-1), who tendered in evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence certificate of registration (RW-1/B), agreement (RW-1/C), letters (RW-1/D) to (RW-1/F).

19. In cross-examination, on behalf of petitioner he denied that the petitioner was working with the respondent company since 1997-98. He denied that the respondent company is the overall supervision and control over the services of the petitioner. He also denied that the petitioner was engaged by the company and they were shown wrongly to be engaged through contractors.

20. Shri Satnam Singh Ahluwalia, Prop. of respondents no.3 & 4, has appeared into the witness dock as (RW-2), and tendered into evidence his sworn-in affidavit (RW-2/A), wherein he reiterated almost all the averments as made in the reply. He also tendered into evidence licence dated 22.2.2014 (RW-2/B), licence dated 3.4.2019 (RW-2/C), renewal (RW-2/D), Form B (RW-2/E), desolation (RW-2/F), agreements Mark RX-1 and Mark RX-2, resolution Mark RX-3, statement of account Mark RX-4 and letter Mark RX-5.

21. In cross-examination on behalf of the petitioner he has stated that the petitioner was already on the rolls of his previous company i.e. Golden Eagle. He denied that the petitioner was

working with HFCL from where he was recruited in Golden Eagle. He denied that I possess the licence for hiring the services of Security Guard and not labourer. He further denied that the petitioner was terminated from services. He volunteered that the workers were transferred and the petitioner was also paid one month's salary, one month's notice pay, leave encashment, bonus and gratuity etc. He admitted that no compensation under section 25-F of the Act was paid. He denied that the petitioner was called at Chandigarh whereby he had agreed to report at Chandigarh. He denied that the petitioner was pressurized to submit his resignation.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri J.C. Bhardwaj, AR for the petitioner has contended with all vehemence that the petitioner there is a clear cut violation of section 25-F of the Act. The petitioner was paid only one month's salary in lieu of notice pay. It is not understandable that why the retrenchment compensation was not paid to the petitioner. It is contended that as per the identity card placed on record by the workmen, most of them were working with the company prior to 2013 and till the date of their termination from service. The plea raised from the side of contractor for the deployment at some other unit is nothing but amounting to camouflage. As a matter of fact, the contractor failed to explain the source from which he has engaged the workers. The workers were already working with the respondent company and their services were transferred on the rolls of the contractor. So far as concerning the plea of abandonment which has to be proved on record. It is further contended that there was pendency of litigation between the parties on account of demand charter dated 29.3.2019. Their services cannot be altered or changed without prior permission or approval from the Tribunal where the pendency was lying for adjudication, therefore, the retrenchment of these workers amounts to unfair labour practice, hence, they are entitled to be reinstated in service along-with all consequential service benefits including back-wages.

24. Per contra, Shri Vikas Chauhan, Ld. Counsel for the respondent no.1 urged that there is no relationship of employer and employee between the petitioner and respondent company as the services of the petitioner were never engaged by the company. The petitioner was deputed by contractor as contract labour to do the work of Mali with the respondent company. The petitioner was the employee of contractor, hence, the respondent company has no role for the engagement and disengagement of the services of the petitioner. He prayed for the dismissal of the claim petition.

25. Shri Sameer Thakur, Ld. Counsel appearing on behalf of respondents no. 3 & 4, has contended that since the respondents no. 3 & 4, were no longer interested in extending the agreement, hence vide notice duly informed about the termination of contract agreement to the petitioner. The respondent no.4 also served notice on the petitioner informing thereby that the factum of discontinuation of agreement with respondent company. Since, the petitioner was not interested for deployment in other unit, hence, he was paid full and final amount. The petitioner was the employee of respondent no.4 and he was deputed with respondent no.1 company under service provider agreement. He also prayed that the claim filed by the petitioner may kindly be dismissed.

26. I have given my best anxious considerable thought to the respective submissions of the Learned AR for the petitioner, as well Learned Counsel for the respondents and have also scrutinized the entire case record with minute care, caution and circumspection.

27. Thus, from a careful examination of the case record, it is manifestly clear on record that the only grouse raised from the side of the petitioner is that her services were engaged 09.03.2004, by the principal employer directly and she remained in service till his services were illegally transferred on the rolls of name lender contractors in the year 2012. It is settled proposition of law that the initial burden lies on the party who alleges the same, therefore, it is the burden

duty of the petitioner to prove the fact that she was initially engaged by the principal employer during 2004. In order to discharge the onus, the petitioner had mainly relied upon the documentary proof i.e identity card issued in the name of the petitioner which reveals that the petitioner was deployed with the respondent company and was engaged through the contractor namely Himachal Security Services. It is also established on record that the nature of employment is recorded as Crech Care Taker, who was engaged on 09.03.2004 and had worked upto 31.03.2008. It is also established on record that a valid licence was issued in the name of respondent no.3, which was renewed from time to time. It is also proved from the agreement dated 22.04.2014 (RW-2/B) and 28.5.2018 Mark RX-2, that the principal employer had executed an agreement with respondent no.3 to carry some work through contractor. It is also proved that the service provider agreements were extended from time to time vide separate letters. Not only this, the petitioner was paid full and final settlement amount by the contractor i.e. respondent no.2. Thus, it can be safely concluded that the petitioner was engaged by the contractors, and definitely she was the employee of respondent no.4 contractor.

28. Now, it has to be seen as to whether the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act by respondent no.4 or not?

29. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

action, but does not include—“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

- “2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-**
- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or**
 - (ii) who is employed in the police service or as an officer or other employee of a prison; or**
 - (iii) who is employed mainly in a managerial or administrative capacity; or**
 - (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”**

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary

- (a) voluntary retirement of the workman;**
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;**
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”**
- (c) termination of the service of a workman on the ground of continued ill-health”**

30. Conclusively, I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent no.3. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. Again their Lordship of Hon’ble Supreme Court by a Seven Judges Bench way back in the year 1978, in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors. (1978) 2 SCC 2013*. It was held an industry in the wider terms of Section 2(j) of the Act, though not all of its employees are workmen. It was held as under:

“The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity.

In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations."

32. A perusal of the above mentioned two judgments of the Hon'ble Supreme Court would clearly established that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wider terms. Even otherwise the true import of the provisions itself is quite wide ranging. It has been defined in such a way so as to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be legitimately concluded that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by an industry, being an unskilled person, is a workman for the purpose of the Act.

33. Verily, without lamenting much stress on the arguments advanced before me by the Ld. Counsel for the parties, I may straightaway jump into the conclusion by referring the pleadings as well as evidence adduced from the side of the respective parties.

34. The next very question which arises for determination that whether the termination of the services of the petitioner 24.07.2019, is violative of the provisions of the Act. It is the case of respondent no.4, that since the contract with the respondent company had come to an end, hence, the petitioner was asked to report for his duties at Chandigarh Office but she refused to report at Chandigarh Office, hence, he was relieved from services by paying an amount to Rs. 48447/- towards her entire dues. No legal or vested rights of the petitioner have been infringed by the respondent no.4 in any manner. It is also admitted position on record that the contractor while terminating the services of the petitioner is to comply with the requirement of the law. The very action on the part of the respondent no.4, while terminating the services of the petitioner has to fall within the four corners of the definition of "retrenchment" as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days as fixed by the Government, hence, she is also entitled for the protection of section 25-F of the Act. It is also admitted fact that before retrenching the services of the petitioner no notice as prescribed under section 25-F of the Act had been issued. The compensation is also to be calculated and asserted as per the provisions of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of

the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, **which provides as under:**

"25-F: No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

35. So, in view of this enabling provision of the Act, no workman employed in any industry, who has been in "continuous service" for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25-B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;**
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—**
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-**
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and**
 - (ii) two hundred and forty days, in any other case...."**

36. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of her retrenchment, her services could not have been terminated unless she was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act, were not followed or complied with by the respondent in the letter and spirit. The respondent no.4 did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

37. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B and 25-F of the Act. The termination is held to be illegal, unlawful and unjustified.

38. Now, the question arises as to what relief, the workman is entitled to? Their Lordships of Hon'ble Supreme Court in an authority reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

39. Similarly, Their Lordship of Hon'ble Delhi High Court in another authority reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed, as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

40. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the workman.

41. Moreso, their Lordships of Hon'ble Supreme Court in another authority reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

42. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in *M.L. Binjolkar v. State of M.P.* (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

43. In the instant case, the petitioner was engaged by contractor i.e. respondent no.2 and thereafter she was deployed with HPPCL i.e. respondent no.1. The petitioner had worked in the capacity of workman. Since, the services of the petitioner were not directly engaged by the respondent no.1, hence, the only remedy available with this Tribunal is to award compensation amount to the petitioner in lump sum amount.

44. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as ***Bharat Sanchar Nigam Ltd. Vs. Bhurumal* (2014) 7 SCC 177** and further reiterated lately in ***P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruvulluvar Transport Corporation Ltd.* (2018) 12 SCC 663** and ***Rashtrasant Tukdoji Maharaj Technical Education Samnatha, Nagpur Vs. Prashant Manikrao Kubitkar* (2018) 12 SCC 294**.

45. In the exposition of law enumerated hereinbefore, now, I would like to award the lump sum compensation to the petitioner in the attendant facts and circumstances of the case.

46. For the foregoing reasons, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the petitioner is held entitled for a lump sum compensation amount of **₹ 1,00,000/- (₹ One lac) as lump sum compensation** from the respondent no.2, who is liable to pay the awarded amount to the petitioner. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent no.4.

ISSUE NO. 2

47. In order to prove this issue, no specific evidence has been led from the side of the respondent, which could go to show as to how the present petition has not been maintainable. Moreover, the present petition has been filed by the petitioner pursuant to reference received from the appropriate government for legal adjudication. I find no illegality in the present petition, which is perfectly maintainable in the present form. Accordingly, this issue is answered in favour of the petitioner and against the respondents.

RELIEF

48. As a sequel to my above discussion and findings on issues no.1 & 2, the claim of the petitioner succeeds and is hereby allowed and the petitioner is awarded lump sum compensation of **₹ 1,00,000/- (one lac), to the workman, to be paid by the respondent no.4 i.e. M/s Golden Globe Industrial and Allied Services, SCO 866, Cabin No. 12-A, First Floor, NAC Manimajra, Chandigarh (Contractor), within a period of two months from the date of announcement of the award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the workman.** This apart, it is expressly made clear that besides lump sum

compensation, **the petitioner is entitled for all his legal dues i.e. leave encashment, EPF, ESI etc.**, admissible, if any, in accordance with law. The reference is disposed off in the aforesaid terms. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 28 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd. (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi.

. .Applicant.

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747) Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, HP

. .Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.

For the Respondent : Shri J.C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd. Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Man Singh** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Man Singh w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1075/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show case notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.

3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no.1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO. 1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Man Singh stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon

documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11) to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the fullfledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. Per contra, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the

chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnataka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal No. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:
 Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244**, has held in para 12 to 15 as under :

“12.The facts of the said case are: The workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application

to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the

ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.

13. **The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.**
14. **Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date**

- of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-a-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. Moreso, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 29 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd. (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II New Delhi.
.. *Applicant* .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747) Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, H.P. . *Respondent*.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J.C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd. Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Yog Raj** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Yog Raj w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1235/-, as one month's wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show case notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . . *OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . . *OPR*.
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Yog Raj stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11), to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36)

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conduct the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters sent by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there were certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal No. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the

Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the

Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others**, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

"12.The facts of the said case are: The workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an

appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman

amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.

13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss
a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the

order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-a-vis the law laid down by the Hon'ble Apex Court (supra) and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire

case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. Moreso, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

RELIEF

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 30 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd. (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat,
Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II New Delhi.
. *Applicant* .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947.

For the Applicant : Shri Vikas Chauhan, Adv

For the Respondent : Shri J.C Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Moti Ram** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Moti Ram w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman

could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1000/-, as one month's wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show case notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.
3. Relief
9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.
10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no.1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2:

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Moti Ram stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11) to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting

the full fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrans India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Dehli), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal No. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any,

connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10

clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: The workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention

and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
 - (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
 - (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
 - (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under

Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative

- for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33

would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. Moreso, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

RELIEF

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 31 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd. (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi.

..Applicant .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv
For the Respondent : Shri J.C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd. Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Ram Krishan** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Ram Krishan w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1170/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the

respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show case notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA.*
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR.*
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no. 1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2:

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Narender. He denied that workman is directly connected with the demand notice in

reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Ram Krishan stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11) to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the

present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is asumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Dehli), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal No. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

- (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—
- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:
Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.
- Explanation.*—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.
- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-quanon* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of

any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: The workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of

Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).

- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
 - (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
 - (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative.

- He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.
14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. **The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”**

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-a-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. Moreso, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

RELIEF

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 32 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd. (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II New Delhi.
. Applicant .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747) Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, HP. *. Respondent.*

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J.C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Harvinder Singh** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Harvinder Singh w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1065/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show case notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . . *OPA.*
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . . *OPR.*
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no. 1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award

REASONS FOR FINDINGS

ISSUES NO.1 & 2.

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Harvinder Singh stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11) to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Dehli), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal No. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—
- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings

or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12. The facts of the said case are: The workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the

- workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
 - (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
 - (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a

shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside

under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to

prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

RELIEF

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 33 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi.
..Applicant.

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747) Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . .Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J. C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (hereinafter to be referred as The Act) arising in the matter of reference petition no. 138 of 2019

preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Anuj Jamwal** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed *w.e.f.* 17-7-2020 *vide* dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Anuj Jamwal *w.e.f.* 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 708/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show case notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr.

Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . . *OPA*.

2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . . *OPR*.

3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no.1 No.

Issue No. 2 No.

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO. 1 & 2.

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Anuj Jamwal stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11), to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the fulflashed domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of

the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and termianted their services in violation of principles of natrual justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is asumed that there was certain faults lying on the part of the respodnent even then the respodnent management cannot be allowed to defy the law of land by not folloing the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Dehli), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal No. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a

complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244**, has held in para 12 to 15 as under :

“12. The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application *inter alia* on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile,

because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.

- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.
14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether **it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant**

approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble in as much as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee

under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

RELIEF:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 34 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
. .Applicant.

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747) Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P.
. .Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J.C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Ramesh Dutt** (respondent herein) has been issued two chargesheets and domestic enquiry was conducted on both chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 15.07.2020 under clause b of sub section 2 of Section 33 of the Act and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Ramesh Dutt w.e.f. 17.07.2020, as per management’s letter dated 15.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is submitted that the workman was suspended on 11.07.2019 mentioning therein that the detailed chargesheet along-with article of charges shall be served which was never served to the workman till 15.07.2020. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the General Secretary of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was holding the post of General Secretary of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1197/-, as one month's wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheets are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Anoop Kumar. He denied that Anoop Kumar is directly connected with the demand notice in reference petition no. 138 of 2019, being General Secretary. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive (P-18). He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Ramesh Dutt stepped into the witness box as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that the domestic enquiry was initiated. He denied that the workers at his instance started illegal strike in the company from 14.2.2019. He admitted to have filed complaint with DIC Solan regarding unit-V. He further admitted that the company issued the lock-out notice on 27.07.2019. He also admitted to have participated in the enquiry proceedings. He admitted that dues were paid to him. He denied that the enquiry proceedings were held in compliance to the principles of natural justice, as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), enquiry proceedings (P-3), enquiry report (P-4), show cause notice (P-5), workers reply (P-6), dismissal letter (P-7), letter dated 22.07.2020 (P-8), letter dated 29.07.2020 (P-9), past record of workers (P-10) to (P-18) and pen drive along-with certificate 65-B (P-19). On the contrary, the respondent has relied upon documents i.e offer letter (R-1), appointment letter (R-2), demand notice (R-3), notice of conciliation officer (R-4), order of reference (R-5), notice of Court (R-6), list of office bearer of union (R-7), list of protected workmen (R-8), suspension letter (R-9), letter to Registrar of Trade Union (R-10) & (R-11), lock-out notice (R-12), show cause notice (R-13), letter of prohibition (R-14), letter to management (R-15), letters to Labour Officer

(R-16) to (R-18), letter to S.P (R-19), undertaking by parties (R-20), chargesheet dated 5.7.2019 (R-21), request for Hindi version of chargesheet (R-22), refusal by management (R-23), reply to the chargesheet (R-24), second chargesheet (R-25), request for Hindi version (R-26), refusal for Hindi version (R-27) & (R-28), reply to second chargesheet (R-29), letter for domestic enquiry (R-30), letter for day to day proceedings (R-31), & (R-32), letter to enquiry officer (R-33), letters for documents (R-34) & (R-35), envelope (R-36), request for associating in enquiry (R-37), second show cause notice along-with enquiry reports (R-38), reply to show cause notice (R-39), dismissal letter (R-40), application under section 33-2 (b) by the Management (R-41), Court orders (R-42), letter to management (R-43), letter to SDM (R-44), letter by SDM (R-45), letter to SHO (R-46), letter to enquiry officer Mark RX-1, letter by management Mark RX-2, reply from enquiry officer Mark RX-3, domestic enquiry Mark RX-4, salary certificate Mark RX-5, letter to EO Mark RX-6, Police reports mark RX-7 and Mark RX-8.

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full flashed domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J. C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the

chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there were certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—**
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the

employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvlious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under sectoin 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a

complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harrasment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is signe-qua-non to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244**, has held in para 12 to 15 as under :

“12. The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not

confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.

- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
 - (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the

requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and

obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 35 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat,
Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
..Applicant .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J. C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Pushpa Kumari** (respondent herein) has been issued two chargesheets and domestic enquiry was conducted on both chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 15.07.2020 under clause b of sub section 2 of Section 33 of the Act and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Pushpa Kumari w.e.f. 17.07.2020, as per management’s letter dated 15.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is submitted that the workman was suspended on 11.07.2019 mentioning therein that the detailed chargesheet along-with article of charges shall be served which was never served to the workman till 15.07.2020. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the General Secretary of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was holding the post of General Secretary of the aforesaid union and is a protected workman for all purposes and her service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1033/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheets are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . . *OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . . *OPR*.

3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Anoop Kumar. He denied that respondent is directly connected with the demand notice in reference petition no. 138 of 2019, being protected workman. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive (P-18). He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Smt. Pushpa Kumari stepped into the witness box as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, she admitted that the domestic enquiry was initiated. She denied that the workers at her instance started illegal strike in the company from 14.2.2019. She admitted to have filed complaint with DIC Solan regarding unit-V. She further admitted that the company issued the lock-out notice on 27.07.2019. She also admitted to have participated in the enquiry proceedings. She admitted that dues were paid to her. She denied that the enquiry proceedings were held in compliance to the principles of natural justice, as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), enquiry proceedings (P-3), enquiry report (P-4), show cause notice (P-5), workers reply (P-6), dismissal letter (P-7), letter dated 22.07.2020 (P-8), letter dated 29.07.2020 (P-9), past record of workers (P-10) to (P-18) and pen drive along-with certificate 65-B (P-19). On the contrary, the respondent has relied upon documents i.e offer letter (R-1), appointment letter

(R-2), demand notice (R-3), notice of conciliation officer (R-4), order of reference (R-5), notice of Court (R-6), list of office bearer of union (R-7), list of protected workmen (R-8), suspension letter (R-9), letter to Registrar of Trade Union (R-10) & (R-11), lock-out notice (R-12), show cause notice (R-13), letter of prohibition (R-14), letter to management (R-15), letters to Labour Officer (R-16) to (R-18), letter to S.P (R-19), undertaking by parties (R-20), chargesheet dated 5.7.2019 (R-21), request for Hindi version of chargesheet (R-22), refusal by management (R-23), reply to the chargesheet (R-24), second chargesheet (R-25), request for Hindi version (R-26), refusal for Hindi version (R-27) & (R-28), reply to second chargesheet (R-29), letter for domestic enquiry (R-30), letter for day to day proceedings (R-31), & (R-32), letter to enquiry officer (R-33), letters for documents (R-34) & (R-35), envelope (R-36), request for associating in enquiry (R-37), second show cause notice along-with enquiry reports (R-38), reply to show cause notice (R-39), dismissal letter (R-40), application under section 33-2 (b) by the Management (R-41), Court orders (R-42), letter to management (R-43), letter to SDM (R-44), letter by SDM (R-45), letter to SHO (R-46), letter to enquiry officer Mark RX-1, letter by management Mark RX-2, reply from enquiry officer Mark RX-3, domestic enquiry Mark RX-4, salary certificate Mark RX-5, letter to EO Mark RX-6, Police reports mark RX-7 and Mark RX-8.

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the fulflashed domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also

argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natrual justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respodnent even then the respondent management cannot be allowed to defy the law of land by not folloing the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

- (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
- (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**

- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in

nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under Section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under Section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244**, has held in para 12 to 15 as under :

“12. The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).**

- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
 - (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
 - (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the

already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so

done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 36 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat,
Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
. *Applicant* .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . *Respondent* .

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J. C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Krishan Lal Thakur** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Krishan Lal Thakur w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1050/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA.*
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR.*
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 No.

Issue No. 2 No.

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S. Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Narender. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Krishan Lal Thakur stepped into the witness box as (RW-1), and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11), to (R-14), union letter to SP (R-15), undertaking by parties (R-16),

chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conduct the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there were certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of

land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the

workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harassment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others**, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was

pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.

- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.
14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer

- has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section

33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

RELIEF:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 37 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat,
Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
..Applicant

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. .Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J. C. Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Narender Kumar** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Narender Kumar w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1050/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1	No
Issue No. 2	No
Relief	Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Narender. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Narender Kumar stepped into the witness box as (RW-1) and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7),

representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11), to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30), Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conduct the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions

of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

- (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
- (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the

employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled

that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harrasment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is signe-qua-non to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was

pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.

- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.
14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer

- has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section

33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 38 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat,
Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
. .Applicant .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . .Respondent.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J. C. Bhardwaj, AR
AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Pawan Kumar** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Pawan Kumar w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 950/-, as one month's wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1 No

Issue No.2 No

Relief. Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Pawan Kumar. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Pawan Kumar stepped into the witness box as (RW-1) and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e. appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11), to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-

29), letter by SDM (R-30) Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the fullfledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natrual justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respondent even then the respodnent management cannot be allowed to defy the law of land by not folloing the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent

has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) **During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) **in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) **for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) **During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—**
 - (a) **alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
 - (b) **for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) **Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—**

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the

applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harrasment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is signe-qua-non to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of

wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the

- ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.
14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date

of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 39 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat, Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
.. *Applicant* .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747) Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . **.Respondent.**

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J.C Bhardwaj, AR

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Prem Chand** (respondent herein) has been issued chargesheet and domestic enquiry was conducted on chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 14.07.2020 under clause b of sub section 2 of Section 33 of the Act, and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Prem Chand w.e.f. 17.07.2020, as per management’s letter dated 14.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is admitted that the chargesheet was issued to the respondent but it is denied that the proper enquiry was conducted by the enquiry officer. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the member of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was the active member of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 950/-, as one month's wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheet are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.
3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Pawan Kumar. He denied that workman is directly connected with the demand notice in reference petition no. 138 of 2019, being office bearer. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive. He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Prem Chand stepped into the witness box as (RW-1) and tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that as per the transfer orders, he has to join by 5.8.2019. He further admitted that he did not join at transferred place. He denied that there is no reference in the demand notice regarding the transfer and domestic enquiry. He admitted that the copy of chargesheet was served upon him. He admitted to have participated in the domestic enquiry. He denied that the enquiry was conducted as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), show cause notice (P-3), reply (P-4), dismissal letter (P-5), letters dated 22.07.2020 and 29.07.2020 (P-6) & (P-7). On the contrary, the respondent has relied upon documents i.e appointment letter (R-1), demand notice (R-2), notice of Court (R-3), notice of conciliation (R-4), order of reference (R-5), lock out notice (R-6), transfer letter (R-7), representation (R-8), show cause notice (R-9), letter of prohibition (R-10), union letter to management (R-11), to (R-14), union letter to SP (R-15), undertaking by parties (R-16), chargesheet (R-17), reply to chargesheet (R-18), letter for domestic enquiry (R-19), letter to enquiry officer (R-20), notice of enquiry (R-21), letter to management (R-22), letter of subsistence allowance (R-23), letter to enquiry officer (R-24), letter to enquiry officer for proceedings (R-25), letter to registrar of Trade Union (R-26) & (R-27), Court orders (R-28), letter to management (R-29), letter by SDM (R-30), Second show cause notice along with enquiry report (R-31), reply to second show cause notice (R-32), dismissal letter (R-33), Police DD entry Mark RX-1 and Mark RX-2, salary certificate Mark RX-3, letter to enquiry officer Mark RX-4, demand notice (R-34), reference (R-35) and notice (R-36).

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and terminated their services in violation of principles of natural justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is assumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the

Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--**
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**
Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—**
 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or**
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.**

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is

to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harrasment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is signe-qua-non to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writting of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate

proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).
- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
- (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
- (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval

stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.

13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.
14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section

33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such

an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case vis-à-vis the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 40 of 2020
Instituted on : 22-07-2020
Decided on : 01-11-2022

HFCL Ltd., (Formerly known as Himachal Futuristic Communication Ltd. Chambaghat,
Solan and Head Office -8, Commercial Complex, Masjid Moth, Greater Kailash-II. New Delhi
. *Applicant* .

VERSUS

Himachal Futuristic Communication Ltd., Group Mazdoor Sangh (Regd. No. 747)
Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . *Respondent*.

Application under section 33 (2)b of the Industrial Disputes Act, 1947

For the Applicant : Shri Vikas Chauhan, Adv.
For the Respondent : Shri J. C. Bhardwaj, AR.

AWARD

This is an usual application on prescribed performa K, as provided under Rule 60(2), of the Industrial Disputes Rules as well as under section 33-2(b) of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) arising in the matter of reference petition no. 138 of 2019 preferred by HFCL Ltd., Chambaghat (**hereinafter to be referred as applicant**) against HFCL Group Mazdoor Union (**hereinafter to be referred as the respondent**).

2. Key facts necessary for the disposal of the present application as alleged by the applicant in the application are thus that the workman **Anoop Kumar** (respondent herein) has been issued two chargesheets and domestic enquiry was conducted on both chargesheet. The enquiry officer submitted the enquiry report and thereafter show cause notice for proposed penalty was issued to the workman. The services of the respondent/workman were dismissed w.e.f. 17.7.2020 vide dismissal letter dated 15.07.2020 under clause b of sub section 2 of Section 33 of the Act and has been paid wages for one month.

3. The following prayer clause has been appended in the footnote of the application, which reads as under:

“The applicant prays that this Court may be pleased to approve the action taken namely dismissal of Mr. Anup Kumar w.e.f. 17.07.2020, as per management’s letter dated 15.07.2020 under clause (b) of sub section (2) of section 33 of the Act.”

4. The lis was resisted and contested by respondent by filing written reply wherein preliminary objections regarding matter not covered under section 33-2(b) but under section 33-1 (a) & (b) of the Act, management resorted to unfair labour practice, Mr. Arvind Kharbanda is not the competent person to file the present application and serve the chargesheet on the workman, enquiry was defective, illegal and does not conform the provisions of Certified Standing Orders and Rules on natural justice, cause of action and maintainability.

5. On merits, it is submitted that the workman was suspended on 11.07.2019 mentioning therein that the detailed chargesheet along-with article of charges shall be served which was never served to the workman till 15.07.2020. Moreso, the documents used in the so called enquiry were not at all supplied to the workman and second show cause notice has been given in English and its translated Hindi version was not supplied to the workman despite request. The workman is the General Secretary of the respondent Union and as such he is directly connected with the dispute and the case of the workers does not fall within the provisions of section 33-2(b) of the Act but covered under section 33-1 (a) & (b) and section 33-3 (a) & (b) of the Act, as the workman was holding the post of General Secretary of the aforesaid union and is a protected workman for all purposes and his service conditions could not have been allowed to altered/dismissed unless the workman could have served express permission under section 33-1 (a) & (b) of the Act. The management paid less amount of Rs. 1450/-, as one month’s wages. It is submitted that the management wanted a settlement signed as per the dictated and desired terms which was not agreed by the respondent, however, the respondent workman was ready to sign the genuine and reasonable settlement.

6. It is further submitted that the charges levelled against the workman in the chargesheets are not proved. Even, no reasonable and proper opportunity of being heard was afforded to the respondent/workman. The enquiry proceedings conducted at the back of the workman, as such the enquiry proceedings are biased, partial and one sided which are not proved on record. The enquiry officer was in hurry to hold the respondent/workman guilty and he held the enquiry in prudent manner. In view of the facts, the enquiry is perverse, one sided. The workman was served with second show cause notice and the enquiry report is in English and its Hindi version was not supplied to the respondent. The management did not obtain the express permission under section 33-1 (a) & (b) of the Act. It is therefore prayed that the present application under section 33-2 (b) of the Act may kindly be dismissed with heavy costs.

7. By filing rejoinder, the applicant management controverted the averments made thereto in the reply and reaffirmed and reiterated those in the application. It is submitted that Mr. Arvind Kharbanda being the Director-cum-Occupier of the applicant company is competent in all aspects to issue all the orders including dismissal and related/allied orders and to file the application as per law.

8. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 09.06.2022, as under:

1. Whether there are sufficient grounds to allow the application under section 33(2) b of the Industrial Disputes Act, 1947, as prayed? . . .*OPA*.
2. Whether the application preferred by the applicant for seeking approval of the Court, is not maintainable, in the present form, as alleged? . . .*OPR*.

3. Relief

9. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

10. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

11. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1 No

Issue No. 2 No

Relief Application dismissed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

12. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

13. In order to substantiate its case, the applicant management has examined Shri G.S Rana, Manager, HR, as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the application.

14. In cross-examination, he admitted that the present application has been filed against the union and Anoop Kumar. He denied that Anoop Kumar is directly connected with the demand notice in reference petition no. 138 of 2019, being General Secretary. He further denied that the respondent/workman was suspended from service on the pretext of getting the matter settled as per the desired terms of the company. He admitted that 2nd show cause notice was not issued by him. He denied that there was no full & final payment offered/paid to the respondent. He further denied that there is tempering in the CCTV footage submitted to the Court vide pen drive (P-18). He also denied that the workman/respondent was suspended/dismissed from service as they were pressing the demands of the workers. He admitted that the workman was protected worker.

15. In order to rebut, the respondent namely Shri Anoop Kumar stepped into the witness box as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

16. In cross-examination, he admitted that the domestic enquiry was initiated. He denied that the workers at his instance started illegal strike in the company from 14.2.2019. He admitted to have filed complaint with DIC Solan regarding unit-V. He further admitted that the company issued the lock-out notice on 27.07.2019. He also admitted to have participated in the enquiry proceedings. He admitted that dues were paid to him. He denied that the enquiry proceedings were held in compliance to the principles of natural justice, as per law.

17. In documentary proof, the applicant company has relied upon enquiry proceedings (P-1), enquiry report (P-2), enquiry proceedings (P-3), enquiry report (P-4), show cause notice (P-5), workers reply (P-6), dismissal letter (P-7), letter dated 22.07.2020 (P-8), letter dated 29.07.2020 (P-9), past record of workers (P-10) to (P-18) and pen drive along-with certificate 65-B (P-19). On the

contrary, the respondent has relied upon documents i.e offer letter (R-1), appointment letter (R-2), demand notice (R-3), notice of conciliation officer (R-4), order of reference (R-5), notice of Court (R-6), list of office bearer of union (R-7), list of protected workmen (R-8), suspension letter (R-9), letter to Registrar of Trade Union (R-10) & (R-11), lock-out notice (R-12), show cause notice (R-13), letter of prohibition (R-14), letter to management (R-15), letters to Labour Officer (R-16) to (R-18), letter to S.P (R-19), undertaking by parties (R-20), chargesheet dated 5.7.2019 (R-21), request for Hindi version of chargesheet (R-22), refusal by management (R-23), reply to the chargesheet (R-24), second chargesheet (R-25), request for Hindi version (R-26), refusal for Hindi version (R-27) & (R-28), reply to second chargesheet (R-29), letter for domestic enquiry (R-30), letter for day to day proceedings (R-31), & (R-32), letter to enquiry officer (R-33), letters for documents (R-34) & (R-35), envelope (R-36), request for associating in enquiry (R-37), second show cause notice along-with enquiry reports (R-38), reply to show cause notice (R-39), dismissal letter (R-40), application under section 33-2 (b) by the Management (R-41), Court orders (R-42), letter to management (R-43), letter to SDM (R-44), letter by SDM (R-45), letter to SHO (R-46), letter to enquiry officer Mark RX-1, letter by management Mark RX-2, reply from enquiry officer Mark RX-3, domestic enquiry Mark RX-4, salary certificate Mark RX-5, letter to EO Mark RX-6, Police reports mark RX-7 and Mark RX-8.

18. This is the entire oral as well as documentary evidence adduced from the side of the parties.

19. Shri Vikas Chauhan, Learned Counsel for the applicant/management has contended with all vehemence that the present application has been filed under section 33-2(b) of the Act for seeking the approval of the action taken by the applicant regarding the misconduct which is not connected with the reference petition no. 138 of 2019 and thereby dismissed the services of the respondent. It is contended that there is no reference pertaining to misconduct or transfer is pending on the files of this Tribunal. It is the provisions of section 33-2(b) of the Act which came into existence for approval and not section 33-1 (a) & (b) as alleged by the respondent. Ld. Counsel had carried me through the entire testimony of the charges and argued that the principles of natural justice were duly complied with. The services of the respondent were terminated after conducting the full-fledged domestic enquiry. The principles of natural justice were duly complied with by affording full opportunity of being heard to the workman. The enquiry was conducted in accordance with law. It is only after following the settled procedure, the applicant had initiated the action for which the management had approached this Tribunal seeking the approval of the action taken by the management. The respondent had nowhere challenged the conducting of domestic enquiry or enquiry proceedings. As such, it does not lead in any manner to agitate before this Tribunal by filing subsequent application under section 33-A of the Act which is nothing but counter blast of the present application. It is argued that from the facts and circumstances of the case, the applicant management had succeeded in establishing its case. It is, therefore, prayed that the present application may kindly be allowed. The Ld. Counsel has also relied upon case law laid down by the Hon'ble Apex Court in case titled as **LIC of India and Anr Vs. Ram Pal Singh Bisen 2010 LLR 494, Thiru John & Anr Vs. Returning Officer Ors. 1977 SCR (3) 538, Statesman Ltd., and another Vs. First Industrial Tribunal, West Bengal and ors. 2003 (4) LLN 1005, 2009 LLR 885, 2016 STPL 6444 Delhi, 2009 LLR 187, 2016 LLR 159 and 2005 LLR 245.**

20. *Per contra*, Shri J.C. Bhardwaj, AR, Ld. AR for the respondent has argued that the workman was served with chargesheets and after the enquiry was over, the services of the respondent workman were terminated. He argued that the respondent is one of the office bearer of the workers union duly registered under the Trade Union Act. Hence, the respondent is a protected workman whose rights are duly protected under section 33 (3) of the Act, wherein it is provided that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against any protected workman concerned in such dispute. The pendency

of reference petition no. 138 of 2019, on the files of this Tribunal is an admitted fact. He also argued that the enquiry officer did not conducted the enquiry by following the principles of natural justice and as per certified standing orders. He did not respond to the letters shot of by the workers. It is only after the sixteen points demand charter, which is the subject matter of reference petition no. 138 of 2019. The applicant management had out of rebellion manner had served the chargesheets upon the workmen, those who are duly protected workers and termianted their services in violation of principles of natrual justice, certified standing orders and various provisions of the Act. Even, if for the sake of arguments, it is asumed that there was certain faults lying on the part of the respondent even then the respondent management cannot be allowed to defy the law of land by not following the due and prescribed procedure of law. Amongst the chargesheets, the applicant management had relied upon the various documents, which were not supplied to the workers, which carried not only prejudice but also thwart the rights of the respondent/workman. It is, therefore, prayed that the claim petition may kindly be dismissed. The Ld. AR for the respondent has relied upon case law laid down by the **Hon'ble Apex Court in case titled as John D'souza Vs. Karnatka State Road Transport Corporation Civil Appeal No. 8042 of 2019, Securitrains India (P) Ltd Vs. Shri Rahul (Hon'ble High Court Delhi), Rama Kant Mishra Vs. HP Labour Court-cum-Industrial Tribunal and another (CWP No. 1390 of 2008), K Durga Prasad Vs. The Industrial Tribunal-cum-Labour Court and Ors. (Writ Petition No. 13715 of 2009), Sri Dorairaj Spintex Vs. R. Chittibabu and Ors (Civil Appeal NO. 5897 of 2021) and M/s Cosmo Ferrites Ltd. Vs. State of HP and Ors. (CWP No. 5982 of 2010).**

21. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

22. Before proceeding further, I would like to reproduce the provisions of section 33 of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—**
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**

- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

23. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said

provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisions of section 33-2(b) of the Act.

24. Admittedly, the condition of service to be remained unchanged under certain circumstances during the pendency of proceedings. In the case in hand, the applicant himself admitted that there was pendency of reference petition no. 138 of 2019, by referring to which the applicant has instituted the instant application seeking the approval of the action taken by the employer to the authority to which the proceeding is pending. According to the applicant, the application falls within the ambit of section 33-2(b) and on the other hand, it is pleaded that the application does not fall under section 33-2(b) but it is covered under section 33-1 (a) & (b) of the Act. It is to be noted that the provisions of section 33 cannot be read into isolation. The Tribunal is to take an overall bird eye's view of the entire provisions of section 33 of the Act for its applicability, in the attendant facts and circumstances of the case. Even, if for the same of arguments, it is assumed that there was no reference pending before this Tribunal regarding the alleged misconduct or transfer as pleaded by the applicant, even then, the applicant management save with the express permission in writing or accord the necessary approval of the action taken by the employer, cannot be allowed to change the service conditions of the workers being the protected workman during the pendency of the proceedings.

25. So far as concerning the admission on the part of both the parties regarding the pendency of reference petition no. 138 of 2019, which arises out of sixteen points demand charter dated 19.3.2019, raised by the workers union under section 2-k of the Act, thereby raising as many as sixteen demands. It is particular to point out here that as per demand charter, demand no.10 clearly postulate that the office bearers and executive members of the union shall not be subjected to victimization and harrasment, out of animosity. Therefore, the case pleaded from the side of the respondent workman is clearly covered under clause 10 of the demand charter pertaining to reference petition no. 138 of 2019, which is pending on the files of this Tribunal. At the cost of repetition, the conditions precedent under section 33 of the Act are remained unchanged under certain circumstances, during the pendency of the proceedings. Admittedly, pendency of reference petition no. 138 of 2019, is *signe-qua-non* to oust the applicant from granting any express permission in writing or to accord approval for the action taken by the applicant management.

26. Moreso, section 33 (3) and (4) provides that no employer shall during the pendency of any such proceedings in respect of an industrial dispute, take any action against the protected workman concerned in such dispute, by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing whether by dismissal or otherwise such protected workman save with the express permission in writing of the authority before which the proceeding is pending and in every establishment, the number of workmen to be recognised as protected workmen in accordance with Rules made in this behalf. Admittedly, the HFCL Group Mazdoor Sangh is a registered union under the Trade Union Act.

27. Their Lordships of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, has held in para 12 to 15 as under :

“12.The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

- (i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an

order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).

- (ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.
 - (iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.
 - (iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.
13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already

strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.
15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the

proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

28. As a binding precedent, after taking a holistic view of the entire facts and circumstances of the case *vis-à-vis* the law laid down by the Hon'ble Apex Court (supra), and other connected matters, such as reference no. 138 of 2019, as well as reference no. 141 of 2019, it is manifestly clear on record that this Court vide separate awards has held that the respondent workers had indulged into the act of Gherao/Strike, which is deemed to be illegal. On this Gherao/Strike, the applicant company had issued the lock-out notice, which was also prohibited by the Labour Commissioner and the issue pertaining to this become redundant. Moreso, the respondent/workers were transferred to various places on various counts such as not joining at transferred places, absenteeism, Gherao/strike etc. and chargesheets were issued and domestic enquiry was conducted. The enquiry was initiated against ex-parte. On the basis of the enquiry report, the services of the respondent and other co-workers have been dismissed despite the fact that they are protected workmen. So far as concerning the plea of absenteeism and abandonment, the same is to be proved like any other fact. Since, the fate of reference petitions no. 138 of 2019 and 141 of 2019, and both the references were answered in negative. An overall assessment and careful perusal of the entire case record would leads me to an inescapable conclusion that the discretion vest with the Court/Tribunal is to be exercised more in favour of the workman as the provisions of section 33 would provide a complete code in itself to protect the workers against the victimization, unfair labour practice or harassment during the pendency of the industrial dispute. Definitely, the reference petition no. 138 of 2019 and 141 of 2019 were pending at that time. More so, the discretion vest in the Court/Tribunal is to be exercised carefully. It is settled law that discretion vested in the Court/Tribunal is to be exercised, basing its decision on judicial principles and not to be exercised in a whimsical or capricious manner.

29. With all humility, it is, the enunciation on the point of law, as observed and rendered in the decisions, cited supra, relied upon by the Ld. Counsel for the parties, however, it is a matter of common parlance that every dispute has its own peculiar facts and circumstances. The decisions to be arrived at, as to settle down the controversy in a dispute, depend upon its own merits.

30. For the foregoing reasons and also keeping in view the entire facts and circumstances of the case record, I am of the humble opinion that the applicant company has miserably failed to prove its case beyond preponderance of probability by filing the present application for approval, whereas, the respondent workman was the protected workman, hence, permission of this Court was required. Both the issues are decided accordingly.

Relief:

31. As a sequel to my findings on issues no. 1 & 2, above, the merits of the present application deserves dismissal and the same is hereby ordered to be dismissed. The parties are left behind to bear their costs respectively.

32. Let a copy of this order/award be communicated to the appropriate government for publication in the official gazette.

33. File after completion be consigned to records.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 73 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Anup Kumar s/o Shri Hukam Dutt through J. C. Bhardwaj, President HP AITUC HQ D-1,
3rd Floor City Centre Plaza, Solan, District Solan, H.P. . . *Complainant* .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic
Complex, Chambaghat, Solan Tehsil and District Solan H.P. . . *Respondent*.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C. Bhardwaj, AR
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Anup Kumar (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial

dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 20.07.1992 and presently working as Assistant Engineer and drawing ₹ 37,700/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was suspended on 11.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 5.7.2019 and 6.7.2019 but did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheet and enquiry report are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 15.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to

counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 5.7.2019 and 6.7.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 15.10.2019 and 27.11.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 19.6.2020 thereby held the worker guilty. The worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.

3. Whether the application is not maintainable in the present form, as alleged? . . . *OPR*.

4. fRelief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly yes. Complainant is granted lump sum compensation.

Issue No.2 No.

Issue No.3 No.

Relief. Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Anup Kumar, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admitted that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon office letter (P-1), appointment letter (P-2), demand notice (P-3), notice dated 18.4.2019 (P-4), notification dated 17.9.2019 (P-5), court notice (P-6), list of union office bearer (P-7), list of protected workmen (P-8), chargesheet dated 5.7.2019 (P-9), chargesheet dated 6.7.2019 (P-10), suspension letter (P-11/1) to (P-11/13), letter dated 12.07.2019 (P-14), letter dated 13.07.2019 (P-15) to (P-17), lockout notice (P-18), show cause notice (P-19), order dated 28.9.2019 (P-20), representation of the union (P-21) to (P-25), proceeding before SDM (P-26), letter dated 27.11.2019 (P-27), another letter to FM (P-28), domestic enquiry dated 19.12.2019 (P-29), letter to EO (P-30), letter dated 11.3.2020 (P-31) to (P-36), postal envelope (P-37), letter of EO (P-38), letter dated 4.7.2020 (P-39), 2nd show cause notice along with enquiry report dated 7.7.2020 (P-40), reply to second show cause notice dated 12.7.2019 (P-41), dismissal order (P-42), Court order dated 18.3.2020 (P-43), letter to FM (P-44), letter to SHO (P-45), letter dated 25.5.2019 and 18.7.2019 Mark-PX-1 and Mark-PX-2, letter to EO dated 30.6.2020, Mark PX-3, salary certificate Mark PX-4, letter to SDM Mark PX-5, letter by SDM dated 9.7.2020 Mark PX-6, police reports Mark PX-7 and Mark PX-8. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J.C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the

Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-**
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—**
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**
Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute--**
 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or**
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.**

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member

of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in

nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. **“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? “ If not, what are its effects?”**
2. **Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in

various cases e.g. **Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41)**, **Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514)**, **Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232)**, **Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91)**, **Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100)** and **Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124)**, we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 6,80,000/- (Six lacs and Eighty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping

in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of ₹ 6,80,000/- (**Six lacs and Eighty Thousand**) as **lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 74 of 2020

Instituted on : 12-10-2020

Decided on : 01-11-2022

Narender Kumar Sharma S/o Shri Heta Ram Sharma C/o HL Thakur Village Lower Seri, Galang, Tehsil and District Solan HP through J C Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .*Complainant* .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan H.P. . .*Respondent*.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C. Bhardwaj, AR

For the Respondent

: Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Narender Kumar Sharma (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 24.07.1995 and presently working as Junior Engineer and drawing ₹ 28,600/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 19.7.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheet and enquiry report are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 19.7.2019 and 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 3.10.2019 was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 6.1.2020/16.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020 was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR* .
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1	Partly yes. Complainant is granted lump sum compensation.
Issue No. 2	No
Issue No. 3	No
Relief	Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Narender Kumar Sharma, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice of CO (P-3), suspension letter (P-4) to (P-6), notice of reference (P-7), court notice (P-8), lockout notice (P-9), transfer order (P-10), reply of letter (P-11), show cause notice (P-12), letter of prohibition (P-13), union letter to management (P-14), union letter to CO (P-15) to (P-17), letter to S.P. (P-18), proceedings before SDM (P-19), court order 18.03.2020 (P-20), union letter to FM (P-21), letter to SDM (P-22), letter by SDM (P-23), letter to SHO (P-24), letter to registrar (P-25) to (P-26), charge sheet (P-27) & (P-28), request to FM for Hindi version of chargesheet (P-29), reply to charge-sheet (P-30), domestic enquiry (P-31), request for subsistence allowance (P-32), objection letter by management to enquiry officer (P-33), copy of proceedings (P-34), second show cause notice (P-35), enquiry report (P-36) to (P-37), reply to second show cause notice (P-38), dismissal order (P-39), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-PX-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in vioaltion of the provisons of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued

that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in

nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the actoin taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is perticular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. **“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?” If not, what are its effects?”**
2. **Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in

various cases e.g. **Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41)**, **Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514)**, **Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232)**, **Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91)**, **Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100)** and **Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124)**, we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 4,80,000/- (Four lacs and Eighty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping

in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of **₹4,80,000/- (Four lacs and Eighty Thousand) as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-

(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 75 of 2020

Instituted on : 12-10-2020

Decided on : 01-11-2022

Moti Ram s/o Shri Loki Ram c/o Ram Lal Thakur, Basat Road, Near Rayata Khan
Chambaghat, District Solan HP through J. C. Bhardwaj, President HP AITUC HQ D-1, 3rd Floor
City Centre Plaza, Solan, District Solan, H.P. . .*Complainant* .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic
Complex, Chambaghat, Solan Tehsil and District Solan H.P. . .*Respondent*.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C. Bhardwaj, AR

For the Respondent : Shri Vikas Chauhan, Adv.
AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Moti Ram (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 22.10.1990 and presently working as Senior Technician and drawing ₹24,028/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company

and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 03.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1	Partly yes. Complainant is granted lump sum compensation.
Issue No. 2	No
Issue No. 3	No
Relief	Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Moti Ram, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), suspension letter (P-4) to (P-6), order of reference (P-7), court notice (P-8), lockout notice (P-9), transfer order (P-10), representation dated 21.08.2019 (P-11), show cause notice (P-12), order dated 28.09.2019 (P-13), representation of the union (P-14) to (P-17), letter to S.P. on 07.10.2010 (P-18), proceedings before SDM (P-19), court order 18.03.2020 (P-20), representation dated 04.07.2020 (P-21), letter to SDM (P-22), representation to FM (P-23), letter to SHO (P-24), letter to registrar (P-25) to (P-26), charge sheet dated 18.09.2019 (P-27), representation dated 26.09.2018 (P-28), reply to charge sheet (P-29), letter of enquiry (P-30), letter to FM dated 16.10.2019 (P-31), objection regarding defence assistant (P-32), second show cause notice (P-33), enquiry report (P-34), reply to second show cause notice (P-35), dismissal order (P-36), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravined the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer clauimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in vioaltion of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may

kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) **During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) **in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) **for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) **During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—**
 - (a) **alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
 - (b) **for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the

employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic

Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?"

- 1. "Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?" If not, what are its effects?"**
- 2. Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?"**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be

direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble

Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

“The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages.”

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M. L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiyah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 4,60,000/- (Four lacs and Sixty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of **₹ 4,60,000/- (Four lacs and Sixty Thousand) as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 76 of 2020.
Instituted on : 12-10-2020.
Decided on : 01-11-2022.

Prem Chand Verma s/o Shri Devi Ram C/o Dina Nath Sharma Chamunda Colony, Bye Pass Kather, District Solan HP through J. C Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . . *Complainant* .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan H.P. . . *Respondent*.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C. Bhardwaj, AR
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Prem Chand Verma (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 01.02.1993 and presently working as Technical Assistant and drawing ₹ 25,826/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 15.07.2019 and 18.09.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 03.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 16.1.2020 and 30.01.2020, thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of

misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

- | | |
|-------------|---|
| Issue No. 1 | Partly yes. Complainant is granted lump sum compensation. |
| Issue No. 2 | No |
| Issue No. 3 | No |
| Relief | Application, partly allowed as per operative part of order/award. |

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Prem Chand Verma, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice of CO (P-3), list of office bearer (P-4), list of protected workmen (P-5), suspension letters (P-6) to (P-8), order of reference (P-9), court notice (P-10), lockout notice (P-11), transfer order (P-12), reply of transfer letter (P-13), show cause notice (P-14), letter of prohibition (P-15), union letter to management (P-16) to (P-19), union letter to SP (P-20), proceedings before SDM (P-21), court order 18.03.2020 (P-22), representation to FM (P-23), union letter to SDM (P-24), letter by SDM to Factory Manager (P-25), letter to SHO (P-26), letter to registrar by management (P-27) to (P-28), charge sheet (P-29), reply to chargesheet (P-30), letter of enquiry (P-31), objection letter by management to enquiry officer (P-32), letter by applicant (P-33), letter to EO (P-34) to (P-35), second show cause notice (P-36), enquiry notice (P-37) & (P-38), reply to show cause notice (P-39), dismissal order (P-40), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J.C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a**

workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:
 Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and**
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.**

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provisio to secton 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge

shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. **“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? If not, what are its effects?”**
2. **Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and

dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreover, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service

benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 5,50,000/- (Five lacs and Fifty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of ₹ 5,50,000/- (Five lacs and Fifty Thousand) as **lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section

33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 77 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Harvinder Singh S/o Shri Shamsher Singh R/o Walia Niwas, Near State Bank of Patiala, Chambaghat District Solan HP through J. C Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .*Complainant* .

VERSUS

HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP. . .*Respondent*.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J. C. Bhardwaj, AR
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Harvinder Singh (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the

aforesaid establishment. The complainant joined the respondent employer on 01.07.1992 and presently working as Senior Technical Assistant and drawing ₹ 27,668/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheet and enquiry report are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 03.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .OPP.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .OPR.
3. Whether the application is not maintainable in the present form, as alleged? . . .OPR.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly yes. Complainant is granted lump sum compensation.

Issue No. 2 No

Issue No. 3 No

Relief Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Harvinder Singh, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), list of office bearer (P-4), suspension letter (P-5) to (P-7), order of reference (P-8), court notice (P-9), lockout notice (P-10), transfer order (P-11), representation dated 21.08.2019 (P-12), show cause notice (P-13), order dated 28.09.2019 (P-14), representation of the union (P-15) to (P-18), letter to S.P. on 07.10.2010 (P-19), proceedings before SDM (P-20), court order 18.03.2020 (P-21), representation dated 04.07.2020 (P-22), letter to SDM

(P-23), representation to FM (P-24), letter to SHO (P-25), letter to registrar (P-26) to (P-27), charge sheet dated 18.09.2019 (P-28), reply to charge sheet (P-29), reply to chargesheet (P-30), enquiry report (P-31), objection regarding defence assistant (P-32), subsistence allowance (P-33), letter to FM (P-34), regarding enquiry (P-35), letters to EO (P-36) & (P-37), second show cause notice (P-38), enquiry report (P-39), reply to second show cause notice (P-40), dismissal order (P-41), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J.C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or**

Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

- (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--
- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of

five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making

an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

- 1. “Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?” If not, what are its effects?”**
- 2. Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable

conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreover, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writing with the Department of Industries, Solan, to cancel its unit at

Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514),

Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 5,50,000/- (Five lacs and Fifty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO. 3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping

in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of ₹ 5,50,000/- (Five lacs and Fifty Thousand) as lump sum compensation in lieu of reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 78 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Krishan Lal Thakur s/o Sri Ram Thakur C/o Kal Niwas, Near Kali Mandir, Kaleen, District Solan H.P. through J. C. Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .Complainant .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP. . .Respondent.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C Bhardwaj, AR

For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Krishan Lal Thakur (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 29.07.1994 and presently working as Technical Assistant and drawing ₹ 24,678/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company

and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 03.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is,

therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1 Partly yes. Complainant is granted lump sum compensation.

Issue No. 2 No

Issue No. 3 No

Relief Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Krishan Lal, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted

that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), suspension letter (P-4) to (P-6), order of reference (P-7), court notice (P-8), lockout notice (P-9), transfer order (P-10), representation dated 21.08.2019 (P-11), show cause notice (P-12), order dated 28.09.2019 (P-13), representation of the union (P-14) to (P-17), letter to S.P. on 07.10.2010 (P-18), proceedings before SDM (P-19), court order 18.03.2020 (P-20), representation dated 04.07.2020 (P-21), letter to SDM (P-22), representation to FM (P-23), letter to SHO (P-24), letter to registrar (P-25) to (P-26), charge sheet dated 18.09.2019 (P-27), letter to FM dated 26.9.2019 (P-28), reply to charge sheet (P-29), enquiry report (P-30), subsistence allowance (P-31), letter dated 21.10.2019 (P-32), letter regarding enquiry (P-33), letters to EO (P-34) & (P-35), second show cause notice (P-36), enquiry report (P-37), reply to second show cause notice (P-38), dismissal order (P-39), Police report dated 13.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is

unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a

conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and**
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.**

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an enescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is perticular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication

Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?"

- 1. "Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?" If not, what are its effects?"**
- 2. Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?"**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters

such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble

Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

“The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages.”

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹5,40,000/- (Five lacs and Forty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO. 3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of **₹ 5,40,000/- (Five lacs and Forty Thousand) as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 79 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Ramesh Dutt S/o Shri Bhoop Ram R/o Sai niwas, Near BL Public School Shamti, District Solan HP through J. C Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . . *Complainant* .

VERSUS

HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan H.P. . . *Respondent* .

Complaint under section 33-A of the Industrial Disputes Act, 1947.

For the Applicant : Shri J. C. Bhardwaj, AR.
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Ramesh Dutt (hereinafter to be referred as complainant)** against **HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (hereinafter to be referred as the respondent)**.

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 10.10.1994 and presently working as Assistant Engineer and drawing ₹ 31,114/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was suspended on 11.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheets dated 05.07.2019 and 06.07.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 15.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 05.07.2019 and 06.07.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 15.10.2019 and 11.11.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 19.6.2020, thereby held the worker guilty. The show cause notice dated 07.07.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of

misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

- | | |
|-------------|--|
| Issue No.1 | Partly yes. Complainant is granted lump sum compensation |
| Issue No. 2 | No. |
| Issue No. 3 | No. |

Relief

Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2.

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Ramesh Dutt, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admitted that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon officer letter (P-1), appointment letter (P-2), demand notice (P-3), notice of CO (P-4), notification dated 17.9.2019 (P-5), court notice (P-6), list of union office bearer (P-7), list of protected workmen (P-8), chargesheet dated 5.7.2019 (P-9), chargesheet dated 6.7.2019 (P-10), suspension letter (P-11/1) to (P-11/13), letter dated 12.07.2019 (P-14), letter dated 13.07.2019 (P-15) to (P-17), lockout notice (P-18), show cause notice (P-19), order dated 28.9.2019 (P-20), representation of the union (P-21) to (P-25), proceeding before SDM (P-26), letter dated 27.11.2019 (P-27), another letter to FM (P-28), domestic enquiry dated 19.12.2019 (P-29), letter to EO (P-30), letter dated 11.3.2020 (P-31) to (P-34), postal envelope (P-35), letter of EO (P-36), 2nd show cause notice along with enquiry report dated 7.7.2020 (P-37), reply to second show cause notice dated 12.7.2019 (P-38), dismissal order (P-39), Court order dated 18.3.2020 (P-40), letter to FM (P-41), letter to SHO (P-42), letter dated 25.5.2019 and 18.7.2019 are Mark-PX-1 and Mark-PX-2, letter to EO dated 30.6.2020, Mark PX-3, reply by management to EO dated 30.6.2020 mark PX-4 salary certificate Mark PX-5, letter to SDM Mark PX-6, letter by SDM dated 9.7.2020 Mark PX-7, police reports Mark PX-8 and Mark PX-9. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J.C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the

proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and**
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.**

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under

section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry against the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management”

1. **“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? “ If not, what are its effects?”**
2. **Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval

of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice

adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in *M.L. Binjolkar v. State of M.P.* (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 6,50,000/- (Six lacs and Fifty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO. 3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent

company to pay a sum of ₹ 6,50,000/- (**Six lacs and Fifty Thousand**) as **lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 80 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Pushpa Kumari w/o Shri Rakesh Kumar r/o Satish Lodge, Kotla Nala, District Solan, HP through J. C. Bhardwaj, President H.P. AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . . *Complainant.*

VERSUS

HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan, Tehsil and District Solan H.P. . . *Respondent.*

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C. Bhardwaj, AR
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Smt. Pushpa Kumari (hereinafter to be**

referred as complainant) against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, HP **(hereinafter to be referred as the respondent)**).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 12.05.1994 and presently working as Technical Assistant and drawing ₹ 24,700/- per month as salary at the time of dismissal of her services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was suspended on 11.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to her. She was also served with chargesheets dated 06.07.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish her reply to the chargesheets in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, her services were changed by dismissing her during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize her and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of HP. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the Country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 15.7.2020 which were made effectively from 17.7.2020 on the

complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 06.07.2019, for her alleged misconduct of Gherao/strike, absenteeism and not joining her duties at transferred place. The explanation offered by the complainant vide reply dated 15.10.2019 and 26.11.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 20.06.2020 thereby held the worker guilty. The show cause notice dated 07.07.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of her assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR* .
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No. 1	Partly yes. Complainant is granted lump sum compensation
Issue No. 2	No
Issue No. 3	No
Relief	Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO. 1 & 2.

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Pushpa Kumari, has examined herself as (PW-1), who tendered into evidence her sworn in affidavit (PW-1/A), wherein she reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, she admitted that the present application has been filed by her after the application under section 33-2(b) filed by the respondent company. She admitted that she participated in the enquiry proceedings. She further admitted that no complaint was made to the Labour Officer. She denied that she was paid one month salary at the time of dismissal. She admitted that enquiry report allowed with second show cause notice was served upon her. She denied that she was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), notification dated 17.9.2019 (P-4), court notice (P-5), list of union office bearer (P-6), list of protected workmen (P-7), letter of suspension (P-8) to (P-10), chargesheet dated 6.7.2019 (P-11) & (P-12), letter dated 18.7.2019 (P-13), letter dated 12.07.2019 (P-14), lockout notice (P-15), show cause notice (P-16), order dated 28.9.2019 (P-17), representation of the union (P-18) to (P-23), proceeding before SDM (P-24), reply to chargesheets (P-25), domestic enquiry (P-26), letters to EO (P-27) to (P-30), postal envelope (P-31), letter of EO (P-32), postal envelope (P-33), letter to EO (P-34), 2nd show cause notice along with enquiry report dated 7.7.2020 (P-35), reply to second show cause notice dated 12.7.2019 (P-36), dismissal order (P-37), Court order dated 18.3.2020 (P-38), letter to FM (P-39), letter to SHO (P-40), letter dated 25.5.2019 and 18.7.2019 are Mark-PX-1 and Mark-PX-2, salary certificate Mark PX-3, letter to SDM Mark PX-4, letter by SDM dated 9.7.2020 Mark PX-5, Police reports Mark PX-6 and Mark PX-7. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any

violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of "res-sub-judice". Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

"33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

- (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
- (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute--

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

“Section 33-A is reproduced as under:-

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or

National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of her grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the actoin taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. “Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to

resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? If not, what are its effects?”

- 2. Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to her. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and she is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of

sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writing with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s,

including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages.”

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly,

where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹5,60,000/- (Five lacs and Sixty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO. 3.

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of **₹ 5,60,000/- (Five lacs and Sixty Thousand) as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the complainant/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all her legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 81 of 2020

Instituted on : 12-10-2020

Decided on : 01-11-2022

Man Singh s/o Shri Narinder Singh r/o Village Jhalwari, PO Thana, Tehsil Rohru District Shimla, HP through J. C. Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .*Complainant* .

VERSUS

HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, H.P. . .*Respondent* .

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J.C. Bhardwaj, AR

For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Man Singh (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 07.05.1996 and presently working as Assistant Engineer and drawing ₹ 27,906/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019 w.e.f. 29.7.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of HP. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 03.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of

misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

- | | |
|-------------|--|
| Issue No.1 | Partly yes. Complainant is granted lump sum compensation |
| Issue No. 2 | No |
| Issue No.3 | No |

Relief. Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2.

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Man Singh, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), suspension letter (P-4) to (P-6), order of reference (P-7), court notice (P-8), lockout notice (P-9), transfer order (P-10), representation dated 21.08.2019 (P-11), show cause notice (P-12), order dated 28.09.2019 (P-13), representation of the union (P-14) to (P-17), letter to S.P. on 07.10.2010 (P-18), proceedings before SDM (P-19), court order 18.03.2020 (P-20), representation dated 04.07.2020 (P-21), letter to SDM (P-22), representation to FM (P-23), letter to SHO (P-24), letter to registrar (P-25) to (P-26), charge sheet dated 18.09.2019 (P-27), letter dated 26.09.2019 (P-28), reply to charge sheet (P-29), letter of enquiry (P-30), letter to FM dated 21.10.2019 (P-31), objection regarding defence assistant (P-32), letter for proceedings (P-33), second show cause notice (P-34), enquiry report (P-35), reply to second show cause notice (P-36), dismissal order (P-37), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guise of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of "res-sub-judice". Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

- (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--
- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
 - (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

“Section 33-A is reproduced as under:-

- 33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:— Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.
- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
 - (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid appliation of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the actoin taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an enescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. **“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?“ If not, what are its effects”**
2. **Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged

from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreover, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writing with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and

employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and

Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in **M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224**, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 5,60,000/- (Five lacs and Sixty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO. 3.

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of ₹ 5,60,000/- (**Five lacs and Sixty Thousand**) as **lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 82 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Yog Raj s/o Shri B.D. Sharma C/o Vijay Sharma Karol Vihar Colony, Chambaghat District Solan HP through J. C. Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .*Complainant* .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan H.P. . .*Respondent*.

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J. C. Bhardwaj, AR
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Yog Raj (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 19.01.1994 and presently working as Assistant Engineer and drawing ₹ 32,110/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheet and enquiry report are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of H.P. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 25.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . *OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . *OPR* .
3. Whether the application is not maintainable in the present form, as alleged? . . *OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

- | | |
|-------------|---|
| Issue No. 1 | Partly yes. Complainant is granted lump sum compensation. |
| Issue No. 2 | No. |
| Issue No. 3 | No. |
| Relief. | Application, partly allowed as per operative part of order/award. |

REASONS FOR FINDINGS

ISSUES NO.1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Yog Raj, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment letter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), list of office bearer (P-4), suspension letter (P-5) to (P-7), order of reference (P-8), court notice (P-9), lockout notice (P-10), transfer order (P-11), representation dated 21.08.2019 (P-12), show cause notice (P-13), order dated 28.09.2019 (P-14), representation of the union (P-15) to (P-18), letter to S.P. on 07.10.2010 (P-19), proceedings before SDM (P-20), court order 18.03.2020 (P-21), representation dated 04.07.2020 (P-22), letter to SDM (P-23), representation to FM (P-24), letter to SHO (P-25), letter to registrar (P-26) to (P-27), charge sheet dated 18.09.2019 (P-28), reply to charge sheet (P-29), enquiry report (P-30), objection regarding defence assistant (P-31), subsistence allowance (P-32), letter to FM (P-33), regarding enquiry (P-34), letters to EO (P-35) & (P-36), second show cause notice (P-37), enquiry report (P-38), reply to second show cause notice (P-39), dismissal order (P-40), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents *i.e.* resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in vioaltion of the provisons of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may

kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—**
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or**
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.**
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--**
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or**
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:**

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the

employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

“Section 33-A is reproduced as under:—

- 33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry agaisnt the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications

Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?"

1. **“Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? “ If not, what are its effects?”**
2. **Whether action of the management of M/s Himachal Futuristic Communications Ltd., Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”**

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stage Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e. by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be

direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writing with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble

Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M. L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and other service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 4,00,000/- (Four lacs) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of **₹ 4,00,000/- (Four lacs) as lump sum compensation in lieu of reinstatement, back-wages and other consequential service benefits**, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 83 of 2020

Instituted on : 12-10-2020

Decided on : 01-11-2022

Anuj Jamwal s/o Shri Ranbir Singh Jamwal C/o Shri Chander Bhan, Nanak Niwas, Sunder Cinema Road, Saproon, District Solan H.P. through J C Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .*Complainant* .

VERSUS

HFCL Limited Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan, Tehsil and District Solan, H.P. . .*Respondent* .

Complaint under section 33-A of the Industrial Disputes Act, 1947.

For the Applicant : Shri J.C. Bhardwaj, AR

For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Anuj Jamwal (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 16.12.2002 as Technical Assistant and drawing ₹ 17,368/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 29.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheets dated 6.7.2019, 19.7.2019 and 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheets were issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of HP. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 15.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheets dated 6.9.2019, 19.7.2019 and 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 3.10.2019 was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 6.1.2020/16.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020 was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of

misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly yes. Complainant is granted lump sum compensation.

Issue No. 2 No

Issue No. 3 No

Relief

Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO. 1 & 2

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Anuj Jamwal, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S. Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment as trainee (P-1), appointment letter (P-2), demand notice (P-3), notice dated 18.4.2019 (P-4), suspension letter (P-5) to (P-7), order of reference (P-8), court notice (P-9), lockout notice (P-10), transfer order (P-11), representation dated 21.08.2019 (P-12), show cause notice (P-13), order dated 28.09.2019 (P-14), representation of the union (P-15) to (P-18), letter to S.P. on 07.10.2010 (P-19), proceedings before SDM (P-20), court order 18.03.2020 (P-21), representation dated 04.07.2020 (P-22), letter to SDM (P-23), representation to FM (P-24), letter to SHO (P-25), letter to registrar (P-26) to (P-27), charge sheet dated 18.09.2019 (P-28), charge sheet (P-29), reply to charge-sheet (P-30), charge sheet (P-31), reply to charge sheet (P-32), domestic enquiry report (P-30), subsistence allowance (P-31), letter to FM dated 21.10.2019 (P-33), objection regarding defence assistant (P-34), letter for substantial allowance (P-35), letter to FM dated 21.10.2019 (P-36), letter to enquiry officer for dated 22.10.2019 (P-37), second show cause notice (P-38), enquiry report (P-39) to (P-41), reply to second show cause notice (P-42), dismissal order (P-43), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents *i.e.* resolution (R-1) to (R-3),

Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand notice under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultantly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravened the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guise of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

- (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--
- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—
- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso

to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and**
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.**

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversly the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the proviso to section 33-2(b) of the Act.

27. Without lementing much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievancies by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under

section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry against the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. “Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?” If not, what are its effects?”
2. Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?”

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stag Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show casue notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval

of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writing with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice

adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed 28 as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

“A Division Bench of this Court in *M.L. Binjolkar v. State of M.P.* (2005) 6 SCC 224, referring to a large number of decisions, held as under:

“The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view.”

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and otehr service benefits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹3,90,000/- (Three lacs and Ninty Thousand) as lump sum compensation from the respodnent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3.

43. The respdonent company had raised the obejction that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent

company to pay a sum of **₹3,90,000/- (Three lacs and Ninty Thousand) as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 84 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Ram Krishan s/o Shri Hari Ram r/o Village Dhyampur, PO Ghanughat, Tehsil Arki, District Solan HP through J. C Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, HP. . . *Complainant.*

VERSUS

HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan H.P. . . *Respondent.*

Complaint under section 33-A of the Industrial Disputes Act, 1947

For the Applicant : Shri J. C. Bhardwaj, AR
For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference

petition no. 138 of 2019, instituted by the worker **Shri Ram Krishan (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 01.07.1989 and presently working as Senior Technical Assistant and drawing ` 30,334/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of HP. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the

complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 14.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no. 1	Partly yes. Complainant is granted lump sum compensation.
Issue No. 2	No
Issue No. 3	No
Relief	Application, partly allowed as per operative part of order/award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2.

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Ram Krishan, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment latter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), suspension letter (P-4) to (P-6), order of reference (P-7), court notice (P-8), lockout notice (P-9), transfer order (P-10), representation dated 21.08.2019 (P-11), show cause notice (P-12), order dated 28.09.2019 (P-13), representation of the union (P-14) to (P-17), letter to S.P. on 07.10.2010 (P-18), proceedings before SDM (P-19), court order 18.03.2020 (P-20), representation dated 04.07.2020 (P-21), letter to SDM (P-22), representation to FM (P-23), letter to SHO (P-24), letter to registrar (P-25) to (P-26), charge sheet dated 18.09.2019 (P-27), reply to charge sheet (P-28), letter of enquiry (P-29), letter to FM dated 21.10.2019 (P-30), objection regarding defence assistant (P-31), letter for proceedings (P-32), second show cause notice (P-33), enquiry report (P-34), reply to second show cause notice (P-35), dismissal order (P-36), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand noitce under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultntly, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravined the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer clamed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of secton 33 of the Act. The transfer of the services of the complainant to the different establishment under different eomplyers, do not fall within the preview of defination of industrial establishment. Since, the condition of service of the complainant were changed in vioaltion of the provisons of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guis of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued

that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act

and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provision to section 33-2(b) of the Act.

27. Without commenting much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievances by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry against the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?”

1. “Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified? If not, what are its effects?”

2. Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?"

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stag Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to its normalcy, when the workers were asked to furnish their final undertaking

not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring example of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writing with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alternative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement

is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattarcharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and otehr service beenfits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12**

SCC 663 and Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹ 5,60,000/- (Five lacs and Sixty Thousand) as lump sum compensation from the respondent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO. 3.

43. The respondent company had raised the objection that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of ₹ 5,60,000/- (Five lacs and Sixty Thousand) **as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 85 of 2020
Instituted on : 12-10-2020
Decided on : 01-11-2022

Pawan Kumar s/o Shri Kishori Lal r/o Village Jarai, Po Brewery, District Solan HP through J. C. Bhardwaj, President HP AITUC HQ D-1, 3rd Floor City Centre Plaza, Solan, District Solan, H.P. . .Complainant .

VERSUS

HFCL Limited (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP. . .Respondent.

Complaint under section 33-A of the Industrial Disputes Act, 1947.

For the Applicant : Shri J.C. Bhardwaj, AR.

For the Respondent : Shri Vikas Chauhan, Adv.

AWARD

This is a complaint under section 33-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as the Act**) against the change of service conditions, during the pendency of reference petition no. 138 of 2019, instituted by the worker **Shri Pawan Kumar (hereinafter to be referred as complainant)** against **HFCL Limited** (Formerly known as Himachal Futuristic Communication Ltd., Electronic Complex, Chambaghat, Solan Tehsil and District Solan HP (**hereinafter to be referred as the respondent**)).

2. Key facts necessary for the disposal of the present complaint as alleged by the complainant in the complaint are thus that the appropriate government had referred the industrial dispute, to this Court, raised by the HFCL Group Mazdoor Sangh (**hereinafter to be referred as complainant union**) under reference no. 138 of 2019, to be adjudicated by this Tribunal. The complainant union is registered under the Trade Union Act. There is no other union subsist in the aforesaid establishment. The complainant joined the respondent employer on 17.01.1994 and presently working as Senior Technical Assistant and drawing ₹25,826/- per month as salary at the time of dismissal of his services. The complainant has been dismissed from service during the pendency of reference petition no. 138 of 2019 and action of the employer is illegal, null and void. The employer had resorted to unfair labour practice in various forms such as suspending the services of the complainant and other co-workers, claimed illegal lock-out, took forcible possession of the union office, restrained the workers to assemble outside the factory gate to hold meetings and involved in criminal cases etc.

3. The complainant was transferred on 27.07.2019. The employer bent upon to crush the genuine rights of the complainant and resorted to victimization to him. He was also served with chargesheet dated 18.9.2019 and did not supplied any documents coupled with the chargesheet as such the complainant could not furnish his reply to the chargesheet in the absence relevant documents during the pendency of demand charter dated 29.03.2019, before the Labour-cum-Conciliation Officer, Solan.

4. The said enquiry was defective, illegal and was completely against the provisions of Certified Standing Orders and natural justice. The enquiry officer was not appointed by the competent authority nor the chargesheet was issued and signed by the competent officer. The request of the complainant and other co-workers were not considered. The enquiry officer was biased and partial and submitted the reports in English. Both the chargesheets and enquiry reports are in English and its true translation in Hindi were not supplied despite requests. The employer with ulterior motive to pressurize the complainant and other co-workers to accept the settlement as

per desire motive of the employer. Since, the complainant did not agreed to accept such settlement, hence, his services were changed by dismissing him during the pendency of reference petition no. 138 of 2019. It is further averred that the transfer orders of the complainant was not issued due to exigency of work but was issued to victimize him and to weaker the union, so that settlement could be signed as per the desired terms of the management and as such the dismissal order was never issued with bonafide intention but issued to teach the lesson to the complainant. The transferred place having no relation with the employer and does not come within the definition of industrial establishment as per Certified Standing Orders, as approved by the Labour Commissioner of HP. More so, Certified Standing Orders are only applicable in the State of Himachal Pradesh and the employer is having no branch/office anywhere in the country. The management appointed the enquiry officer of their choice, who conducted the enquiry as per the dictated terms of the company and never followed the principles of natural justice. At first instance the employer pressurize the worker to accept the settlement and when he refused to accept the same he was chargesheeted. Moreover, the enquiry report is totally contrary to the facts and law.

5. The following prayer clause has been appended in the footnote of the complaint, which reads as under:

“Now, it is therefore prayed that your honour may kindly pleased to set aside the dismissal order of dated 14.7.2020 which were made effectively from 17.7.2020 on the complainant and further pray to order the reinstatement of the workman with seniority and continuity along-with back-wages and other consequential benefits and with cost throughout”.

6. The lis was resisted and contested by the respondent company by filing written reply wherein preliminary objections qua maintainability, complaint was filed at belated stage just to counter the application under section 33-2(b), there no contravention to the provisions of the section 33 of the Act, territorial jurisdiction and the service benefits/facilities enjoyed by the complainant prior to his dismissal, were best in the industry.

7. On merits, it is submitted that the employer is engaged in the work of manufacturing of telecom equipment's, however, the unit is left without any substantial work orders resultantly reeling into huge losses. The workforce enrolled with the unit remain sat idle due to lack of work orders. The terms and conditions of the services of the complainant was governed by the appointment letter as well as Certified Standing Orders of the employer as applicable in Solan Unit. The complainant was served with the chargesheet dated 18.9.2019, for his alleged misconduct of Gherao/strike, absenteeism and not joining his duties at transferred place. The explanation offered by the complainant vide reply dated 3.10.2019, was not found satisfactory, hence, the employer decided to hold a domestic enquiry for the alleged misconduct. The enquiry officer submitted his report dated 4.1.2020 thereby held the worker guilty. The show cause notice dated 26.9.2020, was issued and the worker was dismissed from service from 17.7.2020. The employer had complied with the provisions of section 33-2(b) of the Act.

8. It is further submitted that the reference petition no. 138 of 2019 pending adjudication before this Tribunal has no bearing to the dismissal order of the worker as the same is result of misconduct, which is not connected with the dispute under reference. The facts as narrated by the complainant are related to the issue in hand and hence need not any specific reply. The complainant be put strict proof of his assertion made in the complaint. The employer had not resorted to unfair labour practice rather the complainant with ulterior motive raised illegal demands and had taken the employer for a ride with ulterior design in their mind knowing very well that the employer is running into huge losses for the last more than a decade due to no direct demand for the manufacturing of the telecom equipment's/products.

9. It is also not out of place to mention that the employer had tried their level best to accommodate its workers at every place instead of terminating their service at this stage of their lives or by resorting to harsh actions such as close down the unit, retrenchment, lock-out etc. The employer rolled out the Voluntary Retirement Scheme dated 20.2.2020, already opted by number of employees. The complainant was chargesheeted on absenteeism, Gherao/strike and not joining at transferred place and domestic enquiry was conducted on the said charges which resulted into dismissal. The employer had applied for approval before this Tribunal by filing separate application. It is denied that the enquiry was ordered as a matter of resistance. The enquiry officer was an independent and impartial person and conducted the enquiry as per law. The domestic enquiry got conducted is legal and justified. The rest of the allegations were also denied. It is, therefore, prayed that the complaint/application of the complainant be dismissed with heavy costs in the interest of justice and fair play.

10. By filing rejoinder, the complainant/workman controverted the averments made thereto in the reply and reaffirmed and reiterated those in the complaint.

11. On elucidating the pleading of parties, the following issues were struck down by this Court/Tribunal for its final determination, as is evident from order dated 04.08.2022, as under:

1. Whether the respondent has changed the conditions of the services of the petitioner by issuing the transfer order dated 27.7.2019 and termination dated 17.7.2020 during the pendency of the reference no. 138 of 2019 in violation of the provisions of section 33(1) of the Industrial Disputes Act, as alleged? . . .*OPP*.
2. Whether the domestic enquiry conducted by the respondent in compliance to the provisions of principles of natural justice is fair and proper, as alleged? . . .*OPR*.
3. Whether the application is not maintainable in the present form, as alleged? . . .*OPR*.
4. Relief

12. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

13. I have heard the learned counsel for the parties and have also gone through the written submissions submitted on behalf of both the parties and record of the case carefully.

14. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

- | | |
|-------------|---|
| Issue no. 1 | Partly yes. Complainant is granted lump sum compensation. |
| Issue No. 2 | No |
| Issue No. 3 | No |
| Relief | Application, partly allowed as per operative part of order/award. |

REASONS FOR FINDINGS

ISSUES NO.1 & 2.

15. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

16. In order to substantiate its case, the complainant Pawan Kumar, has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made thereto in the complaint.

17. In cross-examination, he admitted that the present application has been filed by him after the application under section 33-2(b) filed by the respondent company. He admitted that he participated in the enquiry proceedings he further admitted that no complaint was made to the Labour Officer he denied that he was paid one month salary at the time of dismissal. He admitted that enquiry report allowed with second show cause notice was served upon him. He denied that he was rightly dismissed from service after conducting fair and proper enquiry.

18. In order to rebut, the respondent company has examined Shri G.S Rana, Manager HR as (RW-1), who tendered into evidence his sworn in affidavit (RW-1/A), wherein he reiterated almost all the averments as made in the reply.

19. In cross-examination, he denied that the workers were paid less than one month wages. He further denied that the workers were transferred during the pendency of the reference. He admit that reference petition No. 129 of 2019 was pending before this court. He denied that the suspension of the protected workers, issuing lock of notice and not following the settlement is unfair labour practice. He denied that the workers were not dismissed by the political authority. He admitted that certified standing order are applicable to Chambaghat Unit. He denied that no documents were supplied to workers at the time of enquiry proceedings. He denied that the subsistence allowance was not paid to the workers. He denied that the workers were not allowed to cross examine the witnesses and lead their defence during the enquiry. He admitted that the workers were transferred during Covid-19.

20. In documentary proof, the complainant has relied upon appointment latter (P-1), demand notice (P-2), notice dated 18.4.2019 (P-3), suspension letter (P-4) to (P-6), order of reference (P-7), court notice (P-8), lockout notice (P-9), transfer order (P-10), representation dated 21.08.2019 (P-11), show cause notice (P-12), order dated 28.09.2019 (P-13), representation of the union (P-14) to (P-17), letter to S.P. on 07.10.2010 (P-18), proceedings before SDM (P-19), court order 18.03.2020 (P-20), representation dated 04.07.2020 (P-21), letter to SDM (P-22), representation to FM (P-23), letter to SHO (P-24), letter to registrar (P-25) to (P-26), charge sheet dated 18.09.2019 (P-27), reply to charge sheet (P-28), letter of enquiry (P-29), letter to FM dated 21.10.2019 (P-30), objection regarding defence assistant (P-31), letter for proceedings (P-32), second show cause notice (P-33), enquiry report (P-34), reply to second show cause notice (P-35), dismissal order (P-36), Police report dated 13.07.2020 and 16.07.2020 and 16.07.2020 is Mark-Px-1 and Mark-PX-2, salary certificate Mark PX-3. On the contrary, the respondent management has relied upon documents i.e. resolution (R-1) to (R-3), Show cause notice (R-4), dismissal letter (R-5), application under section-33 (2) (B) (R-6), letter 22.07.2020 (R-7), letter 29.07.2020 (R-8) on record.

21. This is the entire oral as well as documentary evidence adduced from the side of the parties.

22. Shri J. C. Bhardwaj, AR for the complainant has contended with all vehemence that the complainant has preferred a demand noitce under section 2-K dated 29.3.2019, under labour law legislation. The employer had declined the request to discuss on the said demand charter and resorted to unfair labour practice. Resultently, the appropriate government had sent the reference no. 138 of 2019 and 141 of 2019, which are pending adjudication before this Tribunal. The employer had contravined the provisions of section 33 of the Act and started victimization and pressurized the complainant to settle the demands as per the wishes of the company. The employer

claimed illegal lock-out for 63 workers during the pendency of the demand charter. The said lock-out was prohibited by the Labour Commissioner vide order dated 28.2.2020 but it was not lifted for long and 63 workers are not allowed to enter the factory premises. The transfer orders were issued in contravention of the provisions of section 33 of the Act. The transfer of the services of the complainant to the different establishment under different employers, do not fall within the preview of definition of industrial establishment. Since, the condition of service of the complainant were changed in violation of the provisions of section 33 and 9-A of the Act during the pendency of above said two references, hence, the respondent company is liable to be punished. The transfer is unjust and unfair as per section 2 (r) (a) of the 5th Schedule and its clause-VII, which prohibits the transfer of workmen from one place to another under the guise of management. It is, therefore, prayed that the complaint filed by the complainant may kindly be allowed and the complainant may kindly be ordered to be reinstated in service with seniority and continuity along-with full back-wages.

23. *Per contra*, Shri Vikas Chauhan, Ld. Counsel for the respondent company has argued that the provisions of section 33-A of the Act would come into play only when there was any violation/contravention of section 33 of the Act. The contravention of section 33 is the foundation for the exercise of the jurisdiction under section 33-A of the Act. It is argued that the respondent had already filed an application for approval of the dismissal of the complainant under section 33-2 (b) of the Act, hence, the present application is not maintainable and is against the doctrine of “res-sub-judice”. Since, the issue in hand was already pending before this Court between the parties, it is therefore prayed that the complaint filed by the complainant may kindly be dismissed.

24. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

25. Before proceeding further, I would like to reproduce section 33 and 33-A of the Act, which reads as under:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-
 - (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
 - (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
- (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

- (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

- (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

- (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or
- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

- (4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.
- (5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]”

“Section 33-A is reproduced as under:—

- 33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation

officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may, make a complaint in writing, in the prescribed manner.

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in indicating in, and promoting the settlement of, such industrial dispute; and
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act, shall apply accordingly”.

26. In all fairness, it is crystal clear that there are very object of section 33 and in context of the provisions of section 33-2(b), it is obvious that the conditions contained under the said provision are to be essentially complied with. In other words, the said condition being mandatory in nature are to be specified if an order of discharge or dismissal is passed under section 33-2(b), is to be operative. The violation of the provisions of section 33 of the Act entails the workman to file a complaint under section 33-A of the Act and makes the employer liable to be punished. It is settled that once a Tribunal approves the action of the management in dismissing or terminating the workman from service, the same relates back to the order of such dismissal or removal. It is equally settled that if a Tribunal refuses to grant the approval sought for under section 33-2(b) of the Act, the effect of it shall be that the order of discharge or dismissal shall not be operative and conversely the workman would be deemed to have continued in service. It is also made clear that not making an application under section 33-2(b) seeking approval or withdrawing an application once made before any order is made thereon, is a case of contravention of the provision to section 33-2(b) of the Act.

27. Without commenting much on the merits of the case, it is satisfactorily proved on record that the complainant had approached this Tribunal for the redressal of his grievances by filing the complaint under section 33-A of the Act, whereas the employer has instituted application under section 33-2(b) of the Act to accord necessary approval for the action taken by the management. The aforesaid application of the employer under section 33-2(b) of the Act was ordered to be dismissed vide separate order/award. Since, the employer was not accorded necessary approval for the action taken by the management regarding the dismissal of the services of the complainant after holding domestic enquiry against the complainant/worker. After receipt of the enquiry report, the employer issued show cause notice and vide dismissal order thereby dismissed the services of the complainant. Since, the action taken on the part of the management was not approved by this Tribunal on filing application under section 33-2(b) of the Act, which was ordered to be dismissed. Once the approval or permission is declined by the Tribunal, the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. This Tribunal reaches to an inescapable conclusion that the necessary permission/approval cannot be ordered as the action on the part of the employer is not bonafide or that the principles of natural justice have been violated or that the enquiry was conducted for not joining at transferred place, Gherao/strike and absenteeism that too during the pendency of dispute before this Tribunal.

28. It is particular to mention that the reference petitions no. 138 of 2019 and 141 of 2019 has been received from the appropriate government which reads as under respectively:

“Whether the 16 points demand-charter No. HFCLGMS/GS/1917, dated 29.03.2019 (copy enclosed) raised by the General Secretary, Himachal Futuristic Communication Ltd. Group

Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. before the Factory Manager, M/S Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & District Solan, H.P. for fulfilling, is proper and justified? If yes, what relief in terms of above demand notice, the aggrieved workmen are entitled to from the above management?"

1. "Whether action of the Himachal Futuristic Communications Ltd. Group Mazdoor Sangh, (Reg. No. 747) Electronics Complex, Chambaghat, Solan to resort to strike w.e.f. 12.07.2019, as alleged by the M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Solan, Tehsil & Distt. Solan, is legal and justified?" If not, what are its effects?"
2. Whether action of the management of M/s Himachal Futuristic Communications Ltd. Electronics Complex, Chambaghat, Tehsil & Distt. Solan, H.P. to serve the lock-out notice dated- 27.07.2019 effective from 29.07.2019 at 9.00 AM onwards on 63 workmen, is legal and justified? If not, what relief of service benefits the aggrieved workmen are entitled to from the above management? If yes, its effects?"

29. More so, it is alleged from the side of the complainant that at the time of serving the chargesheet, no documents were supplied to him. It is also an admitted fact that the enquiry report and show cause notice supplied to the complainant were in English whereas the complainant had requested to supply its true copy of translation in Hindi.

30. Verily, the entire case putforth by the parties would lead me to an inescapable conclusion that the workers union had raised the demand charter dated 29.3.2019 and the present case has a chequered history. According to the employer, the workers had resorted to illegal strike and stag Dharna/Gherao of the office. The workers had absented from performing their duties. As such the services of the workers were transferred to distinct places. On the other hand, it is alleged from the side of the complainant that the company had issued illegal lock-out notice and thereby issued transfer orders and thereafter followed by show cause notice, chargesheet and dismissal orders. As a matter of fact, both the parties are involved in mud slinging to each other to bolster their plea with double strength. At the cost of repetition, this Tribunal had declined prior approval of the action taken by the management of respondent, hence, the workers are deemed to be in service.

31. In my humble opinion, there is absolutely no denial to the fact that the denial of necessary approval to be accorded in favour of respondent management, it is automatic process that the services of the petitioner are revived and he is deemed to be in service, therefore, the suspension of three office bearers and transfer of as many ten executive members of the petitioner union, who are admittedly the protected workmen under the Act, the suspension, issuance of chargesheets and dismissal thereof, are clear cut in violation of provisions of section 33-1 (a) and 33-3(a) and (b) of the Act, wherein it has been provided that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute i.e by altering, to the prejudice of such protected workman, the conditions of service applicable to him, immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. The complainant is deemed to be in service, therefore, the entire process executed by the respondent management regarding the initiation of enquiry and ordering of dismissal are strictly in contravention of the salient provisions of the Act. Moreso, the application filed under section 33-A of the Act having the direct nexus or connection over connected matters

such in the application filed under section 33-2(b) as well as reference petitions received from the appropriate government as reference no. 138 of 2019 and 141 of 2019. Automatically, there will be direct impact of the result of the aforesaid matters to the present application. Admittedly, reference petitions no. 138 of 2019 and 141 of 2019 are sole basis of the litigation. Further non approval of the action of the respondent management by which the services of the petitioner who are protected workers are dismissed. In any case, it is also held by this Tribunal while deciding reference petition no. 141 of 2019 that the petitioners are involved in a continuous acts of Dharna, Strike, Gherao etc., which were held to be illegal and unconstitutional and the illegal strike is in contravention of sections 22 to 24 of the Act. Similarly, the lock out declared by the respondent management, which was also prohibited by the Labour Commissioner and it was only after the intervention of the Hon'ble High Court the precarious situation arose in the premises of the respondent management, had been restored to tis normalcy, when the workers were asked to furnish their final undertaking not to indulge in any unlawful activity and not go on strike, which is contrary to the principles of law and also the provisions of the Act. The issue regarding declaring lockout has been answered redundant. Therefore, taking a holistic view of the matter, while applying my mind to the entire facts and circumstances available on record, reaches to an inescapable conclusion that the respondent management had definitely changed the conditions of services of the complainant during the pendency of industrial dispute under section 2-K of the Act.

32. Now, the question which arises before this Tribunal is as to what relief the complainant is entitled to?

33. The present one is a glaring exemple of the loss of confidence reposed by the employer in the complainant. According to the employer, the complainant had indulged in nefarious activities by filing a complaint in writting with the Department of Industries, Solan, to cancel its unit at Chambaghat. It is argued that since the complainant and other co-workers are involved in the activities against the company policy, hence, the company has lost faith and confidence in him. It is a matter of common parlance that the mutual trust, confidence and faith are certain factors, which are sine-qua-non to build a strong and harmonious relationships between the employer and employee. Once the employer had shown its loss of confidence, faith and trust in the employee, it cannot be said that a worker, who is not trustworthy and confidential against the management policy is a fit person to be retained or ordered to be re-instated. The mutual trust, confidence and faith are backbone of good, peaceful and healthy relationship between the employer and employee. Once the mutual trust, confidence and faith are broken either by way of unfair labour practice adopted by the workers or management as provided in part-I and II of Fifth Schedule annexed with the Act, then it would be in the fitness of things and interest of justice by ordering the parties to parting with or drifting away with a golden handshake, if in case the parties are not willing to do so out of their own, then a duty cast upon this Tribunal to pass an appropriate order, keeping in view the attendant facts, circumstances and evidence on record.

34. Thus, I am left with no other alernative but to pass an award for a lump sum compensation keeping in view the reinstatement, back-wages and other consequential service benefits keeping in view the facts and circumstances of the case. Their Lordships of Hon'ble Supreme Court in a case law reported as **The Workmen of M/s Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. etc. vs. The Management & Ors. 1973 (1) SCC 813**, Hon'ble Supreme Court observed as under:

"10. In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate Vs. The workmen (1971) 1 SCC 742 within the judicial decision of a Labour Court of Tribunal."

35. Similarly, Their Lordship of Hon'ble Delhi High Court in the case law reported as **Nehru Yuva Kendra Sangathan Vs. Union of India & Ors. 2000 IV AD (Delhi) 709**, Hon'ble Delhi High Court dealt with the question of reinstatement and back wages and observed as under:

"The decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The decisions rendered in the 1990s, including the decision of the Constitution Bench in the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since I am bound to follow the decision of the Constitution Bench, I, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages."

36. To combat with, I am persuaded to award compensation in lieu of reinstatement and back wages to the complainant.

37. Again, their Lordships of Hon'ble Supreme Court in case law reported as **M.L. Binjolkar Vs. State of Madhya Pradesh, 2005 VI (S.C.) 413**, Hon'ble Supreme Court observed in paragraph 7 as under :

"Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. Hindustan Motors Ltd. Vs. Tapanj Kumar Bhattacharya & Anr. (2002 (6) SCC 41), Rajendra Prasad Arya Vs. State of Bihar (200 (9) SCC 514), Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh (2005 (3) SCC 232), Haryana State Cooperative Land Development Bank Vs. Neelam (2005 (5) SCC 91), Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors. (2005 (5) SCC 100) and Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr. (2005 (5) SCC 124), we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the court has to weigh the pros and cons of each case and to take a pragmatic view."

38. Their Lordship of Hon'ble Supreme Court in another authority reported as **U.P. State Brassware Corporation Limited and another Vs. Uday Narain Pandey, (2006) 1 SCC 479**, wherein the Hon'ble Supreme Court, observed as under:

"A Division Bench of this Court in M.L. Binjolkar v. State of M.P. (2005) 6 SCC 224, referring to a large number of decisions, held as under:

"The earlier view was that whenever there is interference with the order of termination or retirement, fullback wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

39. In the exposition of law enumerated hereinbefore, now, I would like to examine the merits of the case.

40. In the instant case, since the company has lost faith in complainant, hence, the only remedy available with this Tribunal is to award compensation amount to the complainant in lump sum amount.

41. Recent developments, particularly the trends particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the action of the employer is found to be illegal in view of the provisions Act, both ends of justice would thus be met, in case the complainant is granted compensation in lieu of reinstatement and otehr service beenfits thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

42. For the foregoing reasons and keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, the complainant is held entitled for a lump sum compensation amount of ₹4,00,000/- (Four lacs) as lump sum compensation from the respodnent company. The aforesaid lump sum compensation is awarded to the complainant in lieu of reinstatement, back-wages and other consequential benefits. Hence, both these issues are decided accordingly.

ISSUE NO.3.

43. The respdonent company had raised the obejction that the complaint filed by the complainant under section 33-A of the Act, is not legally maintainable in the present form. Keeping in view of my findings and discussion under issues No. 1 & 2, above, it is crystal clear that the complaint preferred by the complainant is perfectly maintainable in the present form. The present complaint has been preferred under section 33-A of the Act, which is tenable and maintainable in the present form before this Court. Accordingly, this issue is answered in favour of the complainant and against the respondent.

RELIEF

44. As a sequent effect, in the light what has been discussed hereinabove while deciding issued no.1 to 3, this Court/Tribunal hereby ordered and pass specific directions to the respondent company to pay a sum of **₹4,00,000/- (Four lacs) as lump sum compensation in lieu of** reinstatement, back-wages and other consequential service benefits, to the petitioner/ workman, within a period of one months from the date of announcement of the order/award, failing which interest at the rate of 9% (nine percent) would be payable by the respondent to the complainant. This apart, it is expressly made clear that besides lump sum compensation, **the complainant is entitled for all his legal dues i.e gratuity, leave encashment, EPF, ESI etc.**, as admissible, if any, in accordance with law. The complaint preferred under section 33-A of the Act is disposed off in the aforesaid terms. Let a copy of this order/award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 90 of 2019

Instituted on : 04-09-2019

Decided on : 01-11-2022

Sukhvinder Singh s/o Shri Khem Singh R/o Village Bhatoli, P.O. Berthi, Tehsil Jhandutta,
District Bilaspur, H.P. . . *Petitioner* .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan,
H.P. . . *Respondent*.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Sukhvinder Singh (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 27.11.2017, on monthly salary of ₹ 16,785/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 08.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/ termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 08.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

1. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? . . .*OPP.*
2. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to? . . .*OPP.*
3. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1 Partly Yes.

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief. The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in an arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders

and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Sukhvinder Singh has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), reply to second show cause notice (RW-1/F), dismissal letter (RW-1/G), reply to demand notice (RW-1/H), enquiry proceedings (RW-2/B) and enquiry report (RW-2/C).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. . She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the

procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management.

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied

with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 23.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings does not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Sonu Kumar and Manu Sharma were duly examined on 28.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Rajat Sharma and Mukesh Kumar on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an

enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in

place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (Rw-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :—

- (i) Assault or abuse by any person holding a supervisory post or
- (ii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- (a) Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.
- (b) The company may at its discretion give an workman the following punishment in lieu of dismissal.
 - (i) The censure or warning or
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months

from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H. P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 91 of 2019
Instituted on : 04-09-2019
Decided on : 01-11-2022.

Ranjeet s/o Shri Shyam Lal r/o Village Kobridhar, Tehsil Rohroo, District Shimla, HP.
..Petitioner.

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan,
H.P. ..Respondent.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv
For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Ranjeet (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 01.11.2010, on monthly salary of ₹ 13750/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 18.03.2019 without any

reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/ termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 18.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

1. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? . . .*OPP*.
2. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to?. . .*OPP*.
3. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Partly Yes.

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in a arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry

officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Ranjeet has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), reply to second show cause notice (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C).

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic

enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/delinquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 22.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings does not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreover, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Sonu Kumar and Manu Sharma were duly examined on 28.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Rajat Sharma and Mukesh Kumar on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s**

Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestows powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 19 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM

to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid

and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (Rw-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer

of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :-

- (i) Assault or abuse by any person holding a supervisory post or
- (ii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- (c) Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.
- (d) The company may at its discretion give an workman the following punishment in lieu of dismissal.
 - (i) The censure or warning or
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the

punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 92 of 2019

Instituted on : 04.09.2019

Decided on : 01-11-2022

Mukesh Kumar s/o Shri Dhani Ram r/o Village Bhatlog, Tehsil Nalagarh, District Solan,
H.P. . .Petitioner .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan,
H.P. . .Respondent.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv

For the Respondent : Shri Rajiv Sharma, Adv

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Mukesh Kumar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 01.07.2015, on monthly salary of ₹13050/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated *w.e.f.* 09.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5.40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018,

which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed *vide* letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed *vide* letter dated 09.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, *vide* Court order dated 10.11.2021, as under:

1. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? *..OPP.*
2. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to? *..OPP.*
3. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1	Partly Yes.
Issue No. 2	Entitled to reinstatement with seniority and continuity but without back-wages.
Relief	The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS.

ISSUES NO.1 & 2 .

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in an arbitrary manner and did not adhere to the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allowed to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09-10-2018, during the intervening period from 5.40 AM to 6.20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Mukesh Kumar has examined himself as (PW-1), who tendered into evidence his sworn affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He

admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), reply to second show cause notice (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C).

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9-10-2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his

defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/delinquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well as Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 22.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings do not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreover, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Anu Kumari and Manu Sharma were duly examined and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 09.01.2019 and examined Ravinder Kumar and Sukhvinder Singh on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance on the judgment of Hon'ble High Court of Orissa titled as

Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved

on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful

manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (RW-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :

- v. Assault or abuse by any person holding a supervisory post or
- vi. Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- e. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.
- f. The company may at its discretion give an workman the following punishment in lieu of dismissal.
 - (i) The censure or warning or
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the

delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
*Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.*

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 98 of 2019

Instituted on : 02-09-2019

Decided on : 01-11-2022

Shiv Shankar s/o Shri Rameshwar Dass r/o Village Holag, PO Lagdaghat, Tehsil Nalagarh,
District Solan, H.P. . .Petitioner.

VERSUS

he Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan,
HP. . .Respondent.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Shiv Shankar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 03.08.2015, on monthly salary of ₹ 13005/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 09.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 08.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

1. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? . . .*OPP*.
2. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to?. . .*OPP* .
3. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no. 1 Partly Yes.

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2 .

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in an arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Shiv Shankar has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), reply to second show cause notice (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. . She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was

conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C)

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner.

Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 22.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings does not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Sonu Kumar and Manu Sharma were duly examined on 28.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Rajat Sharma and Mukesh Kumar on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without

any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were

duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (RW-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

"28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :-

- (i) Assault or abuse by any person holding a supervisory post or
- (ii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- (i) Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.
- (j) The company may at its discretion give an workman the following punishment in lieu of dismissal.
 - (i) The censure or warning or
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is

further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 99 of 2019

Instituted on : 03-09-2021

Decided on : 01-11-2022

Anil Kumar s/o Shri Krishan Dutt r/o Village Banoi, PO Kot Beja, Tehsil Kasauli, District Solan, H.P. . .*Petitioner* .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. . .*Respondent* .

Claim petition under section 2-A of the Industrial Disputes Act.

For the Petitioner : Shri Niranjana Verma, Adv

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Anil Kumar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was working with the respondent as operator from 05.05.2017, on monthly salary of ₹ 9,845/-. The petitioner has completed 240

working days in each calendar year. The services of the petitioner were terminated w.e.f. 29.10.2018, without any reason on false allegation that he was found sleeping during the duty hours. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and terminated his services. The petitioner was performing his duty to the entire satisfaction of the respondent with his full devotion and sincerity. The petitioner submitted demand notice but no fruitful result can be availed due to the adamant attitude of the respondent. The services of the petitioner have been terminated without following the provisions of the Act.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was appointed as operator w.e.f. 04.12.2017 and he was on probation for a period of six months and he was still on probation as no confirmation letter was issued by the respondent to him. The services of the petitioner were terminated by the respondent on 29.10.2018 while giving him salary in lieu of notice period of 30 days as per appointment letter. The completion of 240 days are denied. The petitioner was found sleeping during duty hours while abandoned the machines in running conditions and since the petitioner was no improving his behavior, hence, his services were terminated as per the terms and conditions of appointment letter. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 05.09.2022, as under:

1. Whether the termination of the services of the petitioner by the respondent w,e,f, 29.10.2018 without complying with the provisions of the I.D Act is illegal and unjustified? If so, to what relief of service benefits the petitioner is entitled to?
..OPP.
2. Whether the present petition is neither competent nor maintainable in the present form, as alleged?
..OPR.
3. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Partly Yes.

Issue No. 2 No

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

11. To substantiate its case, the petitioner namely Shri Anil Kumar has appeared in the witness box as (PW-1) and tendered into evidence his sworn in affidavit (PW-1/A), wherein he reiterated almost all the averments as made in the claim petition. He also tendered in evidence letter (PW-1/B), notice (PW-1/C) and termination letter (PW-1/D).

12. In cross-examination, he admitted that he was engaged vide appointment letter dated 4.12.2017 (R-1), which has been duly signed by him. He admitted to have engaged on probation basis. He denied to have committed mistake during probation period to which he tendered unconditional apology in writing (R-2). He admitted that his services were termination vide letter (R-3). He denied that his behavior and conduct with the respondent company was not found satisfactory during probation period. He admitted to have filed reply (R-4) before the conciliation officer by the respondent. He further admitted to have received the full & final payment of Rs. 32,775/-.

13. In order to rebut, the respondent company has examined Ms. Neetu Magoo, Manager HR of the respondent company as (RW-1), who disposed that the petitioner was appointed as operator vide appointment letter (R-1). The services of the petitioner were probationary so his services were terminated vide termination letter (R-3). The petitioner filed demand notice which was replied by the respondent vide reply (R-4). In cross-examination, she denied that the petitioner was appointed on 05.05.2017. She further denied that the petitioner had completed 240 days in a calendar year. She admitted that they had not issued any notice to the applicant neither any enquiry has been conducted against him. She further admitted that junior to the petitioner were retained and fresher's were recruited. She denied that the services of the petitioner were terminated illegally.

14. This is the entire oral as well as documentary evidence adduced from the side of the parties.

15. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the petitioner is squarely covered under the definition of "*workman*" under the Act. The petitioner was engaged as operator by the respondent company and his services have been terminated illegally without complying with the provisions of the Act as no notice or compensation was paid to him. It is therefore prayed that the claim filed by the petitioner may kindly be allowed.

16. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent company urged that the the present claim petition is not maintainable as the services of the petitioner have been engaged on

probation period and no confirmation letter was issued to him, hence, he does not fall under the definition of workman as prescribed under section 2(s) of the Act. Moreover, the petitioner committed serious misconduct during duty hours as he was found sleeping while operating the machines, hence, his services were rightly terminated in accordance with the terms and conditions stipulated in his appointment letter. It is therefore prayed that the claim petition may kindly be dismissed.

17. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

18. Before adverting to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act, in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”.

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (I) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;

- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;"
- (c) termination of the service of a workman on the ground of continued ill-health"

19. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondents. The question "who is a workman" has been well settled by various judgments of the Hon'ble Supreme Court. In the case of H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737, a Constitution Bench of the Hon'ble Supreme Court has held as under:

"..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation."

20. A perusal of the above judgment of the Hon'ble Supreme Court clearly show that the definition of "workman" as given in Section 2(s) of the Act has been interpreted in the most wide terms. Even otherwise the import of the provisions itself is wide ranging. It has been defined in such a way to include any person doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once a person is engaged for hire or reward, oblivious of the fact that whether the terms of employment are expressed or implied, a person would fall within the parameters of a "workman" atleast for the purposes of this Act. Even if a person is working on contract it cannot be said that he does not fall within the definition of a "workman". It could be that being a contractual employee his disengagement may not fall within the definition of "retrenchment" but the same would be dependent upon the requirements of Sub Section (bb) of the provisions of Section 2(oo) of the Act. However, merely being a contractual employee does not mean that a person will not fall within the definition of "workman". So, a contractual labourer/field assistant employed by a university, being an unskilled person, is a workman for the purpose of the Act.

21. In the instant case, it is categorically proved on record that the petitioner has been engaged as operator vide appointment letter dated 4.12.2017 (R-1). According to the petitioner he was engaged as an operator w.e.f. 05.05.2017 but to this effect he has failed to lead any specific evidence. The appointment letter (R-1) issued by the respondent to petitioner has been admitted by the petitioner in his cross-examination by admitting that he was engaged vide appointment letter dated 4.12.2017 (R-1), which has been duly signed by him. It is also admitted position on record that the petitioner was engaged on probation. The only grouse raised from the side of the respondent company is that the services of the petitioner were terminated as he was found sleeping during duty hours. It is also an admitted position on record that no opportunity of being heard was

given to the petitioner as neither any chargesheet was issued nor domestic enquiry had been conducted in order to prove the allegation of sleeping during duty hours. It is also admitted case that after terminating the services of the petitioner, the respondent company had recruited freshers and retained junior to the petitioner. The respondent has also tried to establish on record that the petitioner has not completed 240 working days in a calendar year preceding his termination. It is well settled incase titled as *State of HP & Ors V/s Bhatag Ram & Anr. as reported in latest HLJ 2007 (HP) 903*. in which it was held that :-

“Continuing of 240 days not necessary in 12 calendar months. It is not necessary to workman to complete 240 days during 12 months for taking the benefits of section 25-G & 25-H of the Act.”

22. The perusal of this ruling, makes it clear that it is not necessary that the workman must complete 240 working days in a preceding calendar year of his termination. In the instant case, the petitioner had worked with the respondent company w.e.f. 4.12.2017 till 29.10.2018 for a period of ten months meaning thereby the petitioner has completed 240 working days prior to his retrenchment. Thus, the case of the petitioner definitely falls under section 25 F of the Industrial Disputes Act, 1947 and moreover, no notice nor any compensation was paid to the petitioner at the time of his termination and obviously therefore, I am of the firm opinion that no notice nor any retrenchment compensation was paid to the petitioner by the respondent at the time of his termination and as such the services of the petitioner have been illegally and wrongly terminated by the respondent without complying the provisions of the Industrial Disputes Act, 1947. The very action on the part of the respondent while terminating the services of the petitioner has to fall within the four corners of the definition of “retrenchment” as envisaged under section 2-oo (bb) of the Act, hence, the termination of the services of the petitioner is held to be bad and nonest in the eyes of law. Since, the petitioner has completed the requirement of days, hence, he is also entitled for the protection of section 25-F of the Act. Therefore, in view of the aforesaid discussion, I am of the considered opinion that the workman was terminated illegally and unjustifiably without complying with section 25-F of the Act, which provides as under:

"No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until :

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and**
- (c) notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette".**

23. So, in view of this enabling provision of the act, no workman employed in any industry, who has been in “continuous service” for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25-B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

24. Since, the petitioner is proved to have completed more than 240 days during the period of twelve calendar months in the preceding year from the date of his retrenchment, his services could not have been terminated unless he was served with one month's mandatory notice and paid the retrenchment compensation, as envisaged under Section 25-F of the Act. Admittedly, the provisions of Section 25-F of the Act were not followed or complied with by the respondent in the latter and spirit. The respondent did not pay the retrenchment compensation to the petitioner, nor had issued any requisite notice to the petitioner.

25. In the back-drop of aforesaid events, it is held that the termination of the petitioner was in violation of the provisions of Sections 25-B, 25-F 25-G and 25-H of the Act. The termination is held to be illegal, unlawful and unjustified. Resultantly, the termination letter dated 29.10.2018, issued to the petitioner is hereby set aside and quashed.

26. It is, thus, held that the disengagement of the petitioner was illegal and against the mandate of the provisions of Sections 25-F of the Act. The termination of the petitioner is, thus, set aside and quashed. The respondent is directed to re-engage the petitioner forthwith on the same post. The petitioner shall be entitled to seniority and continuity in service from the date of his disengagement.

27. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In case titled as **Kanpur Electricity Supply Company Limited Vs. Shamim Mirza, (2009) 1 SCC 20**, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Apex Court in case titled as M/s Ritu Marbals Vs. Prabhakant Shukla 2010 (1) SLJ S.C 70**, that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

28. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the

workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in case titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma, (2005) 2 Supreme Court Cases, 363** that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim"

29. With regard to the merits of the case, there is no denying fact as evident from the testimony of Neetu Magoo, Manager HR (RW-1) that the petitioner was offered employment or engagement as an operator since 4.12.2017 and he had worked as such continuously in such capacity till the time of his termination i.e 29.10.2018. The respondent witness also admitted that neither the petitioner was issued any show cause notice nor subjected to any domestic enquiry. The admissions on the part of the respondent witness are strengthening the case of the petitioner bolstered with double strength as all the averments made thereto in the petition stood duly admitted. The only contention raised from the side of the respondent that during duty hours the petitioner was found sleeping. I failed to understand that what prevented the respondent company to comply the mandatory requirement of sections 25-B and 25-F of the Act.

30. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Therefore, in the stated legal position mentioned herein *ibid*, I find that the respondent was not at all justified in passing the termination order dated 29.10.2018. In view of the entire evidence, on record, coupled with the rulings (*supra*), I have no hesitation in holding that the petitioner is entitled for reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages. Hence, issue no.1 is decided in favour of the petitioner and against the respondent.

ISSUE NO. 3.

31. In order to prove this issue no specific evidence has been led by the respondent which could go to show as to how the present petition is not maintainable especially when both the parties have admitted that before filing of present application, the petitioner has raised the demand notice before the Labour-cum-Conciliation Officer, Solan. I find nothing wrong with this petition which is perfectly maintainable in the present form. Accordingly this issue is answered against the respondent.

RELIEF

32. As a sequent effect, in the light what has been discussed hereinabove while deciding issues no.1 & 2, this Court/Tribunal hereby legitimately concludes and pass specific **directions to the respondent to re-engage the services of the petitioner on the same post and place from where he was terminated/dismissed. The respondent company is also directed to grant seniority and continuity to the petitioner from the date of his illegal termination till his reengagement but without back-wages.**

33. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 100 of 2019

Instituted on : 04-09-2019.

Decided on : 01-11-2022.

Ravinder Kumar s/o Shri Devi Ram r/o Village Baoi, PO Kotbeja, Tehsil Kasauli, District Solan, H.P. . .*Petitioner* .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. . .*Respondent*.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Ravinder Kumar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 11.03.2014, on monthly salary of ₹ 12,775/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 09.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed

the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 08.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

1. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? . . . *OPP*.
2. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to? . . . *OPP*.
3. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Partly Yes.

Issue No.2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in a arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the

enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Ravinder Kumar has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), dismissal letter (RW-1/F), reply to demand notice (RW-1/G), enquiry proceedings (RW-2/B) and enquiry report (RW-2/C).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. . She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised

the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management.

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/delinquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who

filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful persual and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 23.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings does not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Sonu Kumar and Manu Sharma were duly examined on 28.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Rajat Sharma and Mukesh Kumar on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry.

Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers

were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the

fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (Rw-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

"28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :—

ix. Assault or abuse by any person holding a supervisory post or

- x. Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- (i) Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.
- (j) The company may at its discretion give an workman the following punishment in lieu of dismissal.
 - (i) The censure or warning or
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with

holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

(Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Application Number : 69 of 2021
Instituted on : 03-09-2021
Decided on : 01-11-2022.

Rajesh Chand s/o Shri Nanak Chand r/o Village Bharari, PO Lahairi Sarel, Tehsil Ghumarwin, District Bilaspur, H.P. . .Petitioner.

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. . .Respondent.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv.
For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Rajesh Chand (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was working with the respondent as junior group leader from 01.09.1998, on monthly salary of ` 17860/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 21.09.2020, without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letters dated 16.05.2020 and 28.05.2020, thereby suspending the services of the petitioner alleging therein the violation of SOPs and did not obey the directions of the management. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The copy of chargesheet was sent on the whatsapp number of the petitioner. The petitioner was called to file the reply to the chargesheet dated 16.05.2020, which was filed by him 17.05.2020 through whatsapp. but the petitioner has not explained about the charges levelled by the respondent, hence, additional chargesheet dated 28.5.2020 was issued to the petitioner which was replied by the petitioner vide reply dated 13.6.2020 but after considering the reply/replies filed by the petitioner were not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 16.06.2020 and the enquiry officer was requested to enquire into the matter as per the certified

standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings on 29.7.2020 but on this day the petitioner told the enquiry officer that he is not interested in the enquiry proceedings and left the place of enquiry, hence, the enquiry officer proceeded ex-parte against the applicant and completed the enquiry proceedings as per the Certified Standing Orders of the factory. The enquiry officer conducted the enquiry in lawful manner. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the respondent management. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 21.09.2020 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 28.02.2022, as under:

62. Whether the domestic enquiry conducted against the petitioner by the respondent is fair and proper? . . . *OPP.*

63. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue no.1 Partly Yes.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

11. At the very outset, a preliminary issue was framed as to whether the domestic enquiry conducted against the petitioner by the respondent shall be amounting to unfair and unjustified. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in a arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through the union and he was wrongly and illegally proceeded against ex-parte.

12. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with

the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings only once and thereafter he was proceeded against ex-parte and the enquiry officer gave his findings by ignoring the defence of the petitioner/delinquent. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the basic principles of natural justice. So, the punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate to the misconduct alleged by the respondent.

13. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated in the chargesheet. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

14. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had participated in the proceedings only once and thereafter he opt not to attend the proceedings, hence he was proceeded against ex-parte. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner.

15. In order to substantiate its case, the petitioner namely Rajesh Chand has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon dismissal letter (PW-1/B), Chargesheets (PW-1/C) and (PW-1/D), reply to chargesheet (PW-1/F), letter dated 25.11.2019 (PW-1/J), notice under section 2-A (PW-1/K), letter dated 17.6.2019 Mark PX-1 and letter Mark PX-2.

16. In cross-examination, he has admitted that he received chargesheet dated 16.05.2020 and 28.05.2020. He further admitted that he filed the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted that he took participation in the enquiry on 29.07.2020. He denied that the enquiry officer had explained him the procedure of the conducting of enquiry. He further denied that he had refused to sign the documents and left the enquiry room out of his own will. He also denied that he did not cooperate the company during Covid period. He admitted to have received a sum of Rs. 1,95,379/-. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

17. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), second show cause notice (RW-1/C), reply (RW-1/D) and dismissal letter (RW-1/E).

19. In cross-examination, she admitted that there was countrywide lockdown declared by the Union of India w.e.f. 23.03.2020. She further admitted that during lockdown all the workers in

the company were rendered workless/jobless. She also admitted that the workers were called by the company by following the Covid protocol issued from time to time. She denied that relaxations were given to maintain the discipline in the factory as per the standing orders. She admitted that the petitioner was proceeded against ex-parte. She further denied that the enquiry proceedings were prepared at her instance without following the principles of natural justice and the enquiry report is not fair and proper.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date but the petitioner had chosen not to participate in the enquiry proceedings and left the place of enquiry, hence, he was proceeded against ex-parte. He also tendered into evidence documents tendered in enquiry (RW-2/B) and enquiry report (RW-2/C).

21. In cross-examination, he admitted that the petitioner was proceeded ex-parte in the enquiry. He denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined as the charges framed against the petitioner were totally false and fictitious. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent but he opted not to participate in the enquiry proceedings, hence he was proceeded against ex-parte. All the principles of natural justice have been duly complied with during the enquiry proceedings. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the

petitioner and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful persual and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 29.07.2020. The enquiry officer was appointed vide letter dated 16.06.2020 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 06.07.2020. The enquiry proceedings does reflect that the petitioner had not appeared on each and every date of enquiry. The petitioner appeared before the enquiry officer once and thereafter he failed to participate in the enquiry proceedings, hence, he was proceeded against ex-parte and the enquiry officer conducted the enquiry ex-parte by recording the statements of S/Shri Omkar Sharma and Chander Shekhar. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contents that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite in law that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of

the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnataka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire domestic enquiry proceedings.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding false allegations against the petitioner and issued the chargesheet/suspension letters, thereby suspending the services of the petitioner alleging therein that the petitioner failed to follow the instructions of the management and the Ministry of Home Affair regarding Covid-19, protocol and acted totally against the directions of the Deputy Commissioner and the instruction of the management as he left Parwanoo during lock-down despite the directions of the management and even filed false undertaking in getting e-pass during Covid 19 pandemic. In the case in hand, the petitioner/delinquent had not indulged in any of the criminal activity. There is no allegation of causing criminal intimidation etc. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 22 years of his career. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire career of the petitioner. Moreso, to an error is a human being. No one on this planet could have claimed to be attained the ultimate perfection. The only requirement is to be seen that whether the fault or mistake was committed with intentionally or unintentionally or by accident. It is a matter of common parlance that the causing of loss could have been indemnified by way of recoverable equated monthly instalments from the pay and perks of the petitioner. However, for loss which could not be indemnified and quantified, a person cannot be ordered to be hanged for no fault of his.

30. Again, it is an admitted position on record that the allegations levelled against the petitioner are that the petitioner failed to follow the instructions of the management and the Ministry of Home Affair regarding Covid-19, protocol and acted totally against the directions of the Deputy Commissioner and the instruction of the management as he left Parwanoo during lock-down despite the directions of the management and even filed false undertaking in getting e-pass during Covid 19 pandemic.

31. Also, it is also an admitted position on record that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 16.06.2020. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 06.07.2020, he fixed the date of enquiry to be 16.06.2020, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner but he left the place of enquiry, hence, he was proceeded against ex-parte.

32. In the instant case, it is quite deducible from the perusal of the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry

proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of S/Shri Omkar Sharma and Chander Shekhar as management witnesses. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings only once and thereafter he opt not to participate in the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced, he has arrived at the just conclusion.

33. More so, there is nothing on record remotely to suggest in any form that by not following the instructions of the management and the Ministry of Home Affair regarding Covid-19, protocol and acted totally against the directions of the Deputy Commissioner and the instruction of the management as he left Parwanoo during lock-down despite the directions of the management and even filed false undertaking in getting e-pass during Covid 19 pandemic, the petitioner should not be ousted from the job. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, if the petitioner failed to follow the instructions of the management and the Ministry of Home Affair regarding Covid-19, protocol and acted totally against the directions of the Deputy Commissioner and the instruction of the management as he left Parwanoo during lock-down despite the directions of the management and even filed false undertaking in getting e-pass during Covid 19 pandemic, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. The respondent company in its wisdom was free to recover the aforesaid amount from the petitioner, which is also missing in the case in hand. Moreover, the respondent had not notified to the petitioner anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of

each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the petitioner failed to follow the instructions of the management and the Ministry of Home Affair regarding Covid-19, protocol and acted totally against the directions of the Deputy Commissioner and the instruction of the management as he left Parwanoo during lock-down despite the directions of the management and even filed false undertaking in getting e-pass during Covid 19 pandemic and the petitioner was the office bearer of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :-

(xi) Assault or abuse by any person holding a supervisory post or

(xii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

k. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.

I. The company may at its discretion give an workman the following punishment in lieu of dismissal.

(i) The censure or warning or

(ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or

(ii) Withhold the increment not more than 2 years or demote him to a low rank.”

38. The reading of clause 24 would clearly postulated that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

39. Keeping in view the ratio laid down by the having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a second show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

40. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

41. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. **Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments.** It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award.

42. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 70 of 2021
Instituted on : 01-09-2021
Decided on : 01-11-2022.

Vijay Kumar s/o Shri Satpal Singh r/o Village Sarni, PO Saloa, Tehsil Shri Naina Devi Ji,
District Bilaspur, H.P. . . *Petitioner* .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan,
H.P. . . *Respondent*.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv.
For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Vijay Kumar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 04.07.2016, on monthly salary of ₹ 12400/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 20.01.2020, without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 10.07.2019 and 24.07.2019, thereby suspending the services of the petitioner alleging therein that on 01.07.2019, the petitioner damaged

the wheel of F-14 machine and thus caused a loss of Rs. 20,245/- to the respondent management and violated the SOP. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheets dated 22.07.2019 and 24.07.2019, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner and he filed the reply to the chargesheets on 25.07.2019, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 29.07.2019 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 20.1.2020 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 28.02.2022, as under:

1. Whether the domestic enquiry conducted against the petitioner by the respondent is fair and proper? . . . *OPP*.

2. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly Yes

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

11. At the very outset, a preliminary issue was framed as to whether the domestic enquiry conducted against the petitioner by the respondent shall be amounting to unfair and unjustified. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in an arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through the union representative or offered an adequate opportunity to cross-examine the management witnesses.

12. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The zimini orders and documents on daily basis were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the basic principles of natural justice. So, the punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate to the misconduct alleged by the respondent.

13. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not damaged the property of the respondent company. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

14. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders

and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed the reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. It is apparent on the face of the record that each and every day proceedings have been duly signed by him. The petitioner was supplied the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

15. In order to substantiate its case, the petitioner namely Vijay Kumar has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon dismissal letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), demand notice (PW-1/E), letter to Managing Director (PW-1/F), second show cause notice (PW-1/G), and letter dated 11.10.2019 (PW-1/H).

16. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

17. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), second show cause notice (RW-1/E), reply (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she denied that the petitioner was chargesheeted on false and fictitious allegations, which were not true and correct. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C).

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to

put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined as the charges framed against the petitioner were totally false and fictitious. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 12.08.2019. The enquiry officer was appointed vide letter dated 29.07.2019 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 05.08.2019. The enquiry proceedings do not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the

signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Anish Kumar, Hanish Kumar, Kewal Singh, Sunil Kumar, Ankush Rana and Praveen Singh were duly examined on 27.08.2019 and were cross-examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 17.09.2019. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contents that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite in law that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire domestic enquiry proceedings.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding false

allegations against the petitioner and issued the chargesheet/suspension letter dated 22.07.2019 and 24.07.2019, thereby suspending the services of the petitioner alleging therein that on 01.07.2019, the petitioner had caused damage to the wheel of F-14 machine and thus caused a loss of Rs. 20,245/- to the respondent management and violated the SOP. In the case in hand, the petitioner/delinquent had not indulged in any of the criminal activity. There is no allegation of causing criminal intimidation etc. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner. Moreso, to an error is a human being. No one on his earth could have attain the ultimate perfection. The only requirement is to be seen that whether the fault or mistake was committed with intentionally or unintentionally or by accident. It is matter of common parlance that the causing of loss could have been indemnified by way of recoverable equated monthly instalments from the pay and perks of the petitioner. However, for loss which could not indemnified and quantified, a person cannot be ordered to be hanged for no fault of his.

30. It is an admitted position on record that the allegations levelled against the petitioner are that the petitioner damaged the wheel of F-14 machine and thus caused a loss of Rs. 20,245/- to the respondent management and violated the SOP. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 29.07.2019. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 05.08.2019, he fixed the date of enquiry to be 23.8.2019, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Anish Kumar, Hanish Kumar, Kewal Singh, Sunil Kumar, Ankush Rana and Praveen Singh as management witnesses whereas the petitioner examined himself in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful

manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, there is nothing on record that the petitioner while working has caused damage to the property of the respondent company intentionally, hence, cannot be termed as illegal. For a loss of Rs. 20,245/- allegedly caused by the petitioner to the respondent management and violated the SOP, the petitioner should not be ousted from the job. At the cost of repetition, the causing of loss could have been indemnified by way of recoverable equated monthly instalments from the pay and perks of the petitioner. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, if the petitioner damaged the wheel of F-14 machine and thus caused a loss of Rs. 20,245/- to the respondent management and violated the SOP, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. The respondent company in its wisdom was free to recover the aforesaid amount from the petitioner, which is also missing in the case in hand. Moreover, the respondent had not notified to the petitioner anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that while working the petitioner damaged the wheel of F-14 machine and thus caused a loss of Rs. 20,245/- to the respondent management and violated the SOP and the petitioner was the office bearer of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus

apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (RW-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman’s employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :—

- (i) Assault or abuse by any person holding a supervisory post or**
- (ii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.**

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- m. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.**
- n. The company may at its discretion give an workman the following punishment in lieu of dismissal.**
 - (i) The censure or warning or**
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or**

(iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 would clearly postulated that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a second show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. **Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments.** It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award.

43. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

44. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 71 of 2021

Instituted on : 01-09-2021

Decided on : 01-11-2022

Ajay Kumar s/o Shri Des Raj r/o Village Kotha, P.O. Panyali, Tehsil Palampur, District Kangra, H.P. . *Petitioner.*

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. . *Respondent.*

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv.

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Ajay Kumar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 01.12.2015, on monthly salary of ₹ 12450/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 25.01.2020, without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 02.07.2019, thereby suspending the services of the petitioner alleging therein that the management in order to improve the productivity and lessen the operating problems, applicant need to undergone CNC turning (Programming and Operating) Training and the management intends to personal improvement plan to improve the working of the petitioner but he did not improve his working. It is also alleged in the chargesheet that during the segregation the some pieces were rejected due to the violation of the SOPs and the petitioner did not pay any interest in setting the machines in the factory and as such the petitioner has violated the provisions of the Certified Standing Orders of the factory. The reply to the chargesheet was filed but the respondent management had appointed an enquiry officer. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheets dated 02.07.2019, within 72 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner and he filed the reply to the chargesheets on 13.07.2019, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 15.07.2019 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 25.1.2020 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 28.02.2022, as under:

1. Whether the domestic enquiry conducted against the petitioner by the respondent is fair and proper? . . .*OPP.*
2. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly Yes.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

11. At the very outset, a preliminary issue was framed as to whether the domestic enquiry conducted against the petitioner by the respondent shall be amounting to unfair and unjustified. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in a arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through the union representative or offered an adequate opportunity to cross-examine the management witnesses.

12. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The zimini orders and documents on daily basis were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the basic principles of natural justice. So, the punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate to the misconduct alleged by the respondent.

13. On the allegations made thereto in the chargesheet, the petitioner had denied to have committed any misconduct. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

14. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed the reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. It is apparent on the face of the record that each and every day proceedings have been duly signed by him. The petitioner was supplied the copies of day

to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

15. In order to substantiate its case, the petitioner namely Ajay Kumar has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon dismissal letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), demand notice (PW-1/E), letter to Managing Director (PW-1/F), second show cause notice (PW-1/G).

16. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

17. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), second show cause notice (RW-1/E), reply (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she denied that the petitioner was chargesheeted on false and fictitious allegations, which were not true and correct. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C)

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined as the charges framed against the petitioner were totally false and fictitious. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 25.07.2019. The enquiry officer was appointed vide letter dated 15.07.2019 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 17.07.2019. The enquiry proceedings do not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreover, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Jagannath Sitha, Sher Singh and Daljit Singh were duly examined on 13.09.2019 and were cross-examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 11.10.2019. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contents that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite in law that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnataka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire domestic enquiry proceedings.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding false allegations against the petitioner and issued the chargesheet/suspension letter dated 22.07.2019 and 02.07.2019, thereby suspending the services of the petitioner alleging therein that alleging therein that the management in order to improve the productivity and lessen the operating problems, applicant need to undergone CNC (Programming and Operating) Training and the management intends to personal improvement plan to improvise the working of the petitioner but he did not improve his working. It is also alleged in the chargesheet that during the segregation the some pieces were rejected due to the violation of the SOPs and the petitioner did not pay any interest in setting the machines in the factory and as such the petitioner has violated the provisions of the Certified Standing Orders of the factory. In the case in hand, the petitioner/delinquent had not

indulged in any of the criminal activity. There is no allegation of causing criminal intimidation etc. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. There was no such past antecedent or criminal back ground on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 5 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner. Moreso, to an error is a human being. No one on this planet could have claimed to be attaining the ultimate perfection. The only requirement is to be seen that whether the fault or mistake was committed with intentionally or unintentionally or by accident. It is a matter of common parlance that the causing of loss could have been indemnified by way of recoverable equated monthly instalments from the pay and perks of the petitioner. However, for loss which could not indemnified and quantified, a person cannot be ordered to be hanged for no fault of his.

30. Again, it is an admitted position on record that the allegations levelled against the petitioner are that the management in order to improve the productivity and lessen the operating problems, applicant need to undergone CNC turning (Programming and Operating) Training and the management intends to personal improvement plan to improve the working of the petitioner but he did not improve his working. It is also alleged in the chargesheet that during the segregation the some pieces were rejected on account of the violation of the SOPs and the petitioner did not paid any heed in setting up the machines in the factory and as such the petitioner has violated the provisions of the Certified Standing Orders of the factory.

31. Also, it is also an admitted position on record that after serving the chargesheet upon the petitioner, the respdonent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 15.07.2019. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 17.07.2019, he fixed the date of enquiry to be 25.07.2019, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the peittioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the eitnenses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opporutnity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of S/Shri Dinesh Kumar, Jagannath Sitha, Sher Singh and Daljit Singh as management witnesses whereas the petitioner examined himself in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not afforded to the petitioner. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair

and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, there is nothing on record to suggest that in any form that the petitioner while working has violated the SOP, the petitioner should not be ousted from the job. At the cost of repetition, it could have been legitimately concluded by the management by issuing the censure or warning letters to the petitioner, the matter could have been resolved. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, if the petitioner has violated the SOP, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. The respondent company in its wisdom was free to recover the aforesaid amount from the petitioner, which is also missing in the case in hand. Moreover, the respondent had not notified to the petitioner anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that while working the petitioner has violated the SOP and the petitioner was the office bearer of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent vide (RW-1/E), sent written

communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (RW-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman’s employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :—

- (i) Assault or abuse by any person holding a supervisory post or**
- (ii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.**

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- o. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.**
- p. The company may at its discretion give an workman the following punishment in lieu of dismissal.**
 - (i) The censure or warning or**
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or**
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”**

39. The reading of clause 24 would clearly postulated that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing

orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a second show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. **Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments.** It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award.

43. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

44. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 13 of 2021

Instituted on : 19-02-2021

Decided on : 01-11-2022

Sudesh Kumar s/o Shri Maha Dev, r/o Village Bhadon, Tehsil Phoolpur, District Azamgarh, Uttar Pradesh

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. . *Respondent.*

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv.

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Sudesh Kumar (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 04.02.2008, on monthly salary of ₹ 16,945/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 08.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 08.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

68. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? . . .*OPP*.

69. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to? . . .*OPP* .

70. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly Yes.

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in an arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Sudesh Kumar has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), dismissal letter (RW-1/F) and reply to demand notice (RW-1/G).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was

conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings, statement of witnesses and documents tendered in the enquiry (RW-2/B) and enquiry report (RW-2/C).

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly

deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 24.11.2018. The enquiry officer was appointed who had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings does not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Anu Kumari and Manu Sharma were duly examined on 29.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Ranjeet and Sukhvinder Singh on 10.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is

deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the peitioner. It was verified that all the documents were duly supplied. The full opportunity to defend

the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (Rw-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

"28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :—

- (xvii) Assault or abuse by any person holding a supervisory post or**
- (xviii) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.**

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and

**who will give decision in one week from the date of receipt of appeal.
This decision be final subject to legal enactments.**

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- q. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.**
- r. The company may at its discretion give an workman the following punishment in lieu of dismissal.**
 - (i) The censure or warning or**
 - (ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or**
 - (iii) Withhold the increment not more than 2 years or demote him to a low rank.”**

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and

substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 14 of 2021
Instituted on : 19-2-2021
Decided on : 01-11-2022

Rajat Sharma s/o Shri Hemant Sharma, r/o Village Ogi, Tehsil Kasauli, District Solan, H.P.
. Petitioner .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan,
H.P. *. Respondent.*

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv.
For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Rajat Sharma (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 05.06.2017, on monthly salary of ₹ 13400/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 8.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that

after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 8.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

71. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? ..*OPP.*

72. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to? ..*OPP.*

73. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly Yes.

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in a arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Rajat Sharma has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Haradesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into

evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), reply to second show cause notice (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C)

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a

chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/delinquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful persual and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 22.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings does not reflect that the petitioner had not appeared on each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Sonu Kumar and Manu Sharma were duly examined on 28.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Rajat Sharma and Mukesh Kumar on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of

Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier.

There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire career of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e. wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the petitioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the witnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opportunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the

petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on 30.4.2015**, holding that the "doctrine of proportionality" is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (Rw-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman's employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :-

(xix) Assault or abuse by any person holding a supervisory post or

(xx) Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

s. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.

r. The company may at its discretion give an workman the following punishment in lieu of dismissal.

(i) The censure or warning or

(ii) Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or

(iii) Withhold the increment not more than 2 years or demote him to a low rank.”

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC**

87, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Application Number : 15 of 2021

Instituted on : 19-2-2021

Decided on : 01-11-2022

Laxman Dutt s/o Shri Om Prakash, r/o Village Shilor, P.O. Mehano Bag, Tehsil Pachhad, District Sirmour, H.P. . .Petitioner .

VERSUS

The Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, H.P. . .Respondent.

Claim petition under section 2-A of the Industrial Disputes Act

For the Petitioner : Shri Niranjana Verma, Adv.

For the Respondent : Shri Rajiv Sharma, Adv.

AWARD

This is an usual claim petition instituted under section 2-A of the Industrial Disputes Act, 1947 (**hereinafter to be referred as The Act**) preferred on behalf of Shri Laxman Dutt (**hereinafter to be referred as The Petitioner**) against the Factory Manager, IND SPHINX Precision Ltd., 28 Sector-5, Parwanoo, District Solan, HP (**hereinafter to be referred as The Respondent company**).

2. Material facts necessary for the disposal of the present petition, as alleged, by the petitioner in the statement of claim are thus that the petitioner was engaged as an operator from 24.12.2012, on monthly salary of ₹ 13100/-. The petitioner has completed 240 working days in each calendar year. The services of the petitioner were terminated w.e.f. 12.03.2019 without any reason. In fact, the respondent company were not paying the overtime payments to the workers and curtailing other facilities. The petitioner and other workers formed an union to espouse the cause of the workers. On this, the respondent got annoyed and levelled false allegations against the petitioner and issued the chargesheet/suspension letter dated 29.10.2018, thereby suspending the services of the petitioner alleging thereby that on 09.10.2018, the petitioner along-with other co-workers and outsiders gathered on the main gate of the factory at 5:40 AM and stopped the workers of the first shift on the main gate, shouted the slogans against the respondent management affixed the flag of the union on the factory wall and did not allow any person to enter in the factory premises, due to which the production of the factory stopped. The reply to the chargesheet was filed. The petitioner was not allowed to defend his enquiry properly by defending it through his co-worker. The opportunity to cross-examine the management witnesses were not afforded to the petitioner. The enquiry officer had acted in a very arbitrary manner and did not adhere to the principles of natural justice during the enquiry and gave his findings against the petitioner without any cogent reason. A demand notice was also raised.

3. The following prayer clause has been appended, in the footnote of the petition, which reads as under:

“It is therefore, most respectfully prayed that this Hon’ble Court/Tribunal be pleased to allow the application/claim of the applicant/petitioner holding his retrenchment/termination to be illegal and entitled to all service benefits including back-wages, seniority etc. The enquiry report may also be quashed and set aside in the interest of justice.

Any other or further relief, as is deemed just and proper in the facts and circumstances of the case may also be granted in favour of the applicant/petitioner

besides the costs of the proceedings, which would be expedient in the interest of justice.”

4. The lis was resisted and contested by respondent by filing written reply on inter-alia preliminary objections were raised regarding maintainability and not come to the Court with clean hands.

5. On merits, it is submitted that the petitioner was chargesheeted on the complaint, as per the certified standing orders of the factory and as per the terms and conditions of the appointment letter. The petitioner was called to file the reply to the chargesheet dated 29.10.2018, within 48 hours after receiving the chargesheet. The chargesheet-cum-suspension letter was received by the petitioner on 29.10.2018 and he filed the reply to the chargesheet on 30.10.2018, which was not found satisfactory and thereafter the respondent company decided to hold an independent enquiry into the misconduct of the petitioner. The petitioner was informed vide letter dated 03.11.2018 and the enquiry officer was requested to enquire into the matter as per the certified standing orders and as per the principles of natural justice. The enquiry officer gave prior notice of the enquiry to the petitioner and respondent upon to which the petitioner participated in the enquiry proceedings. The enquiry officer conducted the enquiry in lawful manner and the copies of the proceedings, statements of witnesses and documents were duly supplied to the petitioner. The petitioner was provided full opportunity to cross-examine the witnesses of the respondent company and to lead his evidence in defence. The enquiry report is based on the documents supplied during the course of the enquiry proceedings and the oral evidence adduced by the parties. It is further submitted that after receiving the proceedings of enquiry along with enquiry report from the enquiry officer, had decided that the petitioner is not in position to serve with respondent company, hence, second show cause notice was issued to him and thereafter his services were dismissed vide letter dated 12.03.2019 after paying full and final financial dues to the petitioner. It is, therefore, prayed that your honour may be pleased to dismiss the claim petition of the petitioner, in the interest of justice and answer the reference in favour of the respondent management.

6. No rejoinder was intended to be filed.

7. On elucidating the pleading of parties, the following preliminary issues were struck down by this Court/Tribunal for its final determination, vide Court order dated 10.11.2021, as under:

74. Whether the domestic enquiry conducted by the respondent is in violation of the principle of natural justice? ..*OPP*.

75. If issue no.1 is proved in affirmative, than what relief the petitioner is entitled to?. ..*OPP*

76. Relief

8. Based on the pleadings of the parties, this Tribunal had asked the parties to adduce their ocular as well as documentary evidence in support of their case.

9. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter while discussing points for determination, my findings on the aforesaid issues are as under:

Issue No.1 Partly Yes.

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages.

Relief The petition is partly allowed as per operative part of award.

REASONS FOR FINDINGS

ISSUES NO.1 & 2

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. A preliminary issue was framed as to whether the domestic enquiry conducted by the respondent against the petitioner is unfair, unjustified and in violation of the principles of natural justice. The case propounded by the petitioner in brief is that the services of the petitioner were terminated arbitrarily on the basis of false chargesheet and enquiry report on false and baseless allegations as the enquiry conducted against him is not fair, just and proper. It is also the case of the petitioner that the enquiry officer who is a lawyer had commenced the enquiry against the petitioner in a arbitrary manner and did not adhere the petitioner to defend himself properly and adequately through union representative or offered opportunity to cross-examine the management witnesses.

13. Again, it is also the grouse of the petitioner that the enquiry officer had not conducted the enquiry proceedings in a fair and proper manner. The enquiry officer did not even comply with the basic principles of natural justice during conducting the enquiry proceedings. The enquiry officer gave his findings against the petitioner without any cogent reason and law, thus, the enquiry is not fair, just and reasonable. The defence of the petitioner was totally ignored. The enquiry officer did not explain the procedure to be adopted during the course of enquiry. The enquiry proceedings were written by the enquiry officer as per his own choice and as per the witnesses of the management. Though, the petitioner participated in the enquiry proceedings but he was not allowed to submit his defence in a proper manner and not allow to cross-examine the management witnesses. The daily orders and documents were not supplied to the petitioner. The enquiry officer had not recorded the exact version of the witnesses. The enquiry proceedings conducted by the enquiry officer were totally perverse and against the principles of natural justice. The punishment awarded to the petitioner by terminating/dismissing his services were not at all warranted and the punishment of dismissal was also stated to be disproportionate.

14. On the allegations made thereto in the chargesheet, the petitioner had denied having been falsely implicated and not indulged in any of the allegations, such as wilful subordination or dis-obedience, assaulting, intermediating, causing disturbance, participating in illegal strike and not reporting for duties before the commencement of working hours on 09.10.2018, during the intervening period from 5:40 AM to 6:20 AM. As per the petitioner, the sole intention of the respondent management was only to dismiss his services under the guise or pretext of victimization and unfair labour practice along-with other co-workers.

15. On the contrary, the case set up from the side of the respondent management is that the enquiry has been conducted as per the principle of natural justice and the Certified Standing Orders and the petitioner has been dismissed after conducting a just, fair and proper domestic enquiry. The petitioner had duly participated in the proceedings and produced his witnesses. The chargesheet has been duly supplied to the petitioner. During the course of enquiry the petitioner had filed reply to the chargesheet. The procedure prescribed for disciplinary action under the Certified Standing

Orders was duly followed and so were the principles of natural justice followed. The petitioner cross-examined the management witnesses. Each and every day proceedings have been duly signed by him. He was given the copies of day to day proceedings of the enquiry. The enquiry officer had given a detailed and a reasoned enquiry report. The enquiry report was also supplied to the petitioner and a reply has been duly filed by him.

16. In order to substantiate its case, the petitioner namely Laxman Dutt has examined himself as (PW-1), who tendered into evidence his sworn in affidavit (PW-1/A), therein he reiterated almost all the averments as made thereto in the claim petition. In documentary proof, the petitioner has relied upon termination letter (PW-1/B), Chargesheet (PW-1/C), reply to chargesheet (PW-1/D), notice (PW-1/E), enquiry report (PW-1/F), notice (PW-1/G), letter to registrar of trade union (PW-1/H) and letter (PW-1/J).

17. In cross-examination, he has admitted that he was chargesheeted by the company which was delivered to him. He further admitted that he was given time to file the reply. He admitted that he was asked to face the enquiry and he was informed that Shri Hardesh Sharma will be the enquiry officer. He admitted to have explained the procedure. He admitted that his statement was recorded by the enquiry officer and copy of proceedings and statements were also supplied to him. He admitted to have issued the second show cause notice along-with enquiry report. He denied that he is guilty of serious misconduct under the certified standing orders. He also denied that the enquiry was conducted by the enquiry officer as per law by following the principles of natural justice.

18. In order to rebut, the respondent has examined Ms. Neetu Magoo, Manager HR of the respondent company, who has appeared into the witness dock as (RW-1), and tendered into evidence her sworn in affidavit (RW-1/A), wherein she reiterated almost all the averments as made in the reply. She also tendered into evidence chargesheet (RW-1/B), reply (RW-1/C), letter for commencement of enquiry (RW-1/D), show cause notice (RW-1/E), reply to second show cause notice (RW-1/F), dismissal letter (RW-1/G) and reply to demand notice (RW-1/H).

19. In cross-examination, she admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. She admitted that two dresses were given to the petitioner prior to 2018 and thereafter one dress was provided to the workers. . She denied that the petitioner was not allowed to avail the earned leave. She denied that the petitioner through the union raised the issue that they were not paid the overtime payment as per the rules. She further denied that the petitioner was chargesheeted on false and fictitious allegations. She denied that during the enquiry, the petitioner was not afforded the reasonable opportunity of putting his version and defence. She denied that the petitioner was not afforded opportunity to defend himself by seeking the assistance of co-worker. She denied that the management witnesses were given a special increment as reward. She also denied that the petitioner was terminated from service being one of the office bearers of the union.

20. Shri Hardesh Sharma, Advocate the enquiry officer has appeared into the witness box as (RW-2) and tendered into evidence his sworn in affidavit (RW-2/A), wherein he stated that he was appointed as enquiry officer by the respondent and thereafter he issued notices in writing to the petitioner to join the enquiry proceedings which were to be conducted by him. The enquiry was conducted by him as per certified standing orders and principles of natural justice. He explained the procedure of enquiry on the first date and provided full opportunity to the petitioner to defend his case. After closing the evidence of the parties, he filed his report to the management. He also tendered into evidence enquiry proceedings (RW-2/B) and enquiry report (RW-2/C)

21. In cross-examination, he denied that the enquiry proceedings were prepared at the instance of the management representative. He further denied that the petitioner was not allowed to

put his defence in the enquiry. He denied that he had not complied with the principles of natural justice. He also denied that the enquiry was not conducted by following the standing orders and principles of natural justice.

22. This is the entire oral as well as documentary evidence adduced from the side of the parties.

23. Shri Niranjana Verma, Learned counsel for the petitioner has contended with all vehemence that the proper opportunity of being heard was not afforded to the petitioner by the enquiry officer. The enquiry officer mainly relied upon the version of management witnesses. No independent witness was examined, whereas the incident took place outside the factory premises which is a public place. The punishment had already been given to the petitioner by deducting one hour short leave on 9.10.2018. The enquiry officer was not an impartial person and the enquiry was not conducted in a fair, just and impartial manner as the petitioner was not allowed to put his defence. The enquiry officer had not recorded the version of the petitioner. He further argued that sections 5 and 9 of the Industrial Employment (Standing Orders), Act, 1946 were not duly complied with. The petitioner had not remained indulged in any illegal activities and they are performing their legal and constitutional right under the Trade Union Act, 1926 and under Article 19 (1) (C) of the Constitution of India. The enquiry was conducted by not following the certified standing orders and same is not in consonance with the principles of natural justice as the Hon'ble Apex Court has held that right to public employment and its concomitant right to livelihood, which has received protective umbrella under the provisions of Article 14 & 21 of the Constitution of India. It is, therefore, prayed that the claim filed by the petitioner may kindly be allowed.

24. *Per contra*, Shri Rajiv Sharma, Ld. Counsel for the respondent has strenuously argued that the petitioner had indulged in grave misconduct during the course of his employment and a chargesheet was issued to him which was duly replied by him. Feeling dissatisfied with the reply filed by the petitioner, the respondent management decided to hold an independent enquiry in the charges levelled against the petitioner vide chargesheet. The enquiry officer conducted the domestic enquiry as per the Certified Standing Orders and afforded full opportunity of being heard to the petitioner/deliquent. All the principles of natural justice have been duly complied with during the enquiry proceedings. He further argued that the petitioner had participated in the enquiry on each and every date. The enquiry officer submitted his enquiry report to the management of respondent and thereafter 2nd show cause notice along-with enquiry report was issued to the petitioner, who filed its reply which was not found satisfactory and the management took the decision to dismiss the petitioner from service and accordingly, the services of the petitioner were dismissed. It is therefore prayed that the claim petition may kindly be dismissed.

25. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

26. Thus, from a careful perusal and meticulous examination of entire case record, this Tribunal reaches to an inescapable conclusion that all procedural safeguards had been duly deployed by the respondent while conducting the domestic enquiry against the petitioner. Admittedly, presumption in law therefore arises that the enquiry proceedings which were duly supplied to the petitioner. Before initiating the enquiry against the petitioner, he was duly supplied with the chargesheet to which he had filed detailed reply dated 1.11.2018. The conducting of an enquiry by a lawyer is nowhere banned. The enquiry proceedings were commenced from 22.11.2018 to 21.02.2019. The enquiry officer was appointed vide letter dated 03.11.2018 and had duly intimated the concerned parties to appear before him by fixing the date of enquiry vide letter dated 12.11.2018. The enquiry proceedings do not reflect that the petitioner had not appeared on

each and every date of enquiry. The signatures appended by the petitioner bears the testimony to the said factum and so that the signatures of presenting officer during the course of enquiry proceedings. Moreso, both the petitioner and respondent had duly testified that they were supplied day to day proceedings by the enquiry officer. On behalf of management Shri Dinesh Kumar, Bhagat Singh, Sonu Kumar and Manu Sharma were duly examined on 28.12.2018 and were duly examined by the petitioner whereas the petitioner appeared into the witness box as his own defence witness on 16.01.2019 and examined Rajat Sharma and Mukesh Kumar on 09.01.2019, who were duly cross-examined. The proceedings as well as the testimony of the witnesses bears the signatures of the petitioner and the presenting officer. The testimony of both the respondent witnesses (RW-1) and (RW-2) are duly corroborated by the documentary proof placed on record.

27. The learned counsel for the petitioner thus further contend that the enquiry is vitiated for non-furnishing of documents and more so on the demand having been made by the delinquent. In this behalf he placed reliance of the judgment of Hon'ble High Court of Orisa titled as **Management of State Bank of India Vs. Presiding Officer, Industrial Tribunal Orisa and Anr. (2014) LLR 1151**. It is no doubt trite that non-furnishing of documents tends to vitiate the enquiry but in the case in hand the petitioner had sought certain documents regarding which an objection has been raised by the presenting officer vis-a-vis its relevancy to the dispute. There is nothing on record to show that as to what documents were sought and as to what was the prejudice caused to the petitioner in this behalf. The copy of the Standing Orders was however made available to the petitioner on his asking as is clear from the enquiry proceedings on record. There is no specific averment as to what documents were sought.

28. The learned counsel for the petitioner also sought to impeach the veracity of the enquiry proceedings on the ground that the enquiry officer was biased as his father was the advisor/Advocate for the management. In this behalf he has placed reliance upon the judgment of Hon'ble High Court of Delhi titled as **Tajmehal Hotel Vs. Industrial Tribunal-1 Government of NCT of Delhi and Ors. (2015) LLR 1129**. To counter the aforesaid objection the learned counsel for the respondent placed reliance upon the judgment of the Hon'ble Supreme Court titled as **M/s Dalmia Dadri Cement Ltd. Vs. Shri Murari Lal Bikaneria (1970) 3 SCC 259 and South India Cashew Factories Workers Union Vs. Kerla State Cashew Development, (2006) 5 SCC 201**, to contend that conducting of an enquiry by an officer of the management also ipso facto does not vitiate the enquiry and merely because the enquiry officer was an Advocate and had on occasions being engaged by the management did not render him incompetent to hold a domestic enquiry. Moreso, the legislator bestow powers on Labour Court and Industrial Tribunal to go into the question of sufficiency and reliability of evidence produced by the management during enquiry and to come with on its own conclusion on the basis of the said evidence, whether discharge or dismissal in the case was justified or not? It was so held by the Hon'ble Supreme Court in case titled as **State of Haryana Vs. Rattan Singh 1977 (2) SCC 491**. In the case in hand the father of the enquiry officer (RW-2) was the labour law advisor of the company and even he had been working as an enquiry officer with the company for a long time. Admittedly, in the case in hand no objection had been raised to the appointment of the enquiry officer and as held in **H.V Nirmala Vs. Karnatka State Financial Corporation (2008) 7 SCC 639** objection having not been raised to the appointment of an enquiry officer during the enquiry proceedings, the charged employee is deemed to have waived off the objection. Having participated in the enquiry proceedings without any demur whatsoever, witnesses having been cross-examined, the charged officer cannot now turn back and allege that prejudice has been caused by the reason of appointment of a legal officer as an enquiry officer. The same principle will apply in the case in hand. Even otherwise going by the ratio laid down by the Hon'ble Supreme Court discussed hereinabove, it cannot be said that the appointment of (RW-2) ipso facto is not sufficient to vitiate the entire enquiry.

29. In the long and short of the present industrial dispute, so far as concerning to the assertion of the allegation levelled therein against the petitioner/delinquent regarding assembly or

getting together at the factory gate, raising slogans against the respondent management and affixation of union flag on the wall of the factory, stoppage of production work etc. In the case in hand, there are no such allegations that the petitioner along-with other co-workers had caused damage to the property of the respondent company, they had indulged in any of the criminal activity. There is forming of unlawful assembly. There is no allegation of causing criminal intimidation etc. Rather the petitioner along-with other co-workers had assembled and gathered at the factory gate during early morning hours from 5:40 AM to 6:20 AM. It is apposite to mention here that as per the chargesheet and case record, this is the only single incident. So far as concerning the allegation that the petitioner had stopped the workers by not allowing them to enter or come outside the factory gate, it is not at all satisfactorily proved on record that there was any shift of worker, who wants to enter the factory during the intervening period. The management had levelled the allegation that the petitioner had "Gherao" the respondent company, on the other hand it is said that they were standing outside the gate of the company. It is also not satisfactorily proved on record that during the wee hours i.e early morning hours, who were the officers of the company, who were prevented from entering the factory premises. However, as per the report of the enquiry officer, he had himself questioned the allegation levelled by the respondent management. According to the enquiry officer, the work was stopped only for 25 minutes. Even, if for the sake of arguments, the allegation levelled against the petitioner is with regard to the stoppage of production work for 25 minutes, I failed to understand that how the production was stopped for 1.20 hours. There is absolutely no particular evidence on record that the petitioner had used abusive/offensive language. There was no criminal invention on the part of the petitioner. It is significant to note that the petitioner union had raised the demand notice by raising various demands to the respondent company. The services of the petitioner were dismissed for merely a solitary circumstance. As a matter of fact, the petitioner had rendered a long span of approximately 10-12 years of his carrier. There was no complaint or misconduct in the past service record of the petitioner. The single instance cannot wipe out the entire carrier of the petitioner.

30. It is an admitted fact that the allegations levelled against the petitioner are that on 09.10.2018, during the intervening period of early morning hours i.e wee hours right from 5:40 AM to 6:20 AM, the petitioner along-with other co-workers had assembled and gathered outside the factory gate and thereby started Gheraoed the factory alongwith outsiders. The workers were not allowed to enter inside the factory and made to wait outside the factory gate. The workers started shouting slogans against the respondent management of the respondent company. The shift workers were stopped inside the factgory gate. The workers also affixed flags on the factory wall. All this has been happened illegally and thereby violates the provisions of the Certified Standing Orders as applicable in the respondent company.

31. It is also admitted that after serving the chargesheet upon the petitioner, the respondent company appointed one Shri Hardesh Sharma, Advocate as an enquiry officer vide letter dated 03.11.2018. Shri Hardesh Sharma (RW-2), the enquiry officer has categorically stated that after issuing the notice dated 12.11.2018, he fixed the date of enquiry to be 23.11.2018, for the commencement of the enquiry proceedings. First of all, the procedure was properly explained to the peittioner. It was verified that all the documents were duly supplied. The full opportunity to defend the case, cross-examine the eitnesses and copies of statement of witnesses and all proceedings were duly supplied to the petitioner. The petitioner was also afforded full opporutunity to produce his witnesses in defence.

32. In the instant case, it is quite deducible from the case record that the enquiry officer (RW-2), who has authored the enquiry report (RW-2/C) based on the enquiry proceedings (RW-2/B). It is quite evident that the enquiry officer during the enquiry has recorded the statement of Shri Dinesh Kumar, Bhagat Singh, Anu Kumar, Monu Sharma as management witnesses whereas the petitioner examined himself along-with Rajat Sharma and Mukesh Kumar in defence. Both, the

management and defence witnesses were also subjected to the cross-examination at length. The opportunity of being heard was duly afforded to the petitioner. Therefore, it cannot be said that opportunity for not conducting cross-examination was not afforded to the petitioner. Not only this, the chargesheet was duly served upon the petitioner. The petitioner was also issued second show cause notice coupled with the enquiry report. The reply to the chargesheet as well as second show cause notice has been filed from the side of the petitioner. The petitioner has duly participated in the enquiry proceedings. The petitioner had also signed almost all the enquiry proceedings. Thus, there is no question of not affording any reasonable apprehension of not affording full opportunity to the petitioner during the enquiry proceedings. Both the parties were afforded full opportunity of being heard during the enquiry proceedings. The copies of statement of witnesses and proceedings were duly supplied to the delinquent. Hence, by stretch of no imagination, it could not be legitimately concluded that full opportunity to the petitioner to produce his witnesses and documents were not supplied. As such, the enquiry officer had conducted the enquiry in a lawful manner, which is fair and proper, within the ambit and scope and as per the procedure laid down in the Certified Standing Orders as well as by following the principles of natural justice as applicable to the parties. Undoubtedly, the enquiry officer had pointed out in the enquiry report (RW-2/C) that on the basis of oral and documentary evidence produced from the parties, he has arrived at the just conclusion.

33. More so, the hoisting of a flag, forming of union, holding meetings, distribution of sweets, raising of peaceful slogans for genuine demands that is also outside the main gate of the factory, cannot be termed as illegal. The right of living life with dignity and freedom of speech and expression with all reasonable restrictions are duly protected under Article 14, 19 and 21 of the Constitution of India. In this case, it is proved that the domestic enquiry conducted against the petitioner is proper and valid, however, the order of termination/dismissal of the petitioner awarding punishment to the petitioner is not wholly justified. In my humble opinion, in the attendant facts and circumstances of the case, I am of the considered humble opinion that the dismissal order would not be justified. This Court had given due weightage to the entire facts and circumstances of the case. Though, the domestic enquiry conducted against the petitioner is valid and proper but still this Court is of the considered opinion that the respondent company has miserably failed in justifying its decision/action for dismissing the services of the petitioner.

34. Verily, it is thus clear that whatever had happened on 09.10.2018, was apparently in view of the dispute having arisen between the management and the workers union. Oblivious of the fact that no notice was required to be issued to the petitioner and other workmen as per the Standing Orders before dismissing them, it was still incumbent upon the disciplinary authority to have taken into consideration the gravity of the misconduct, the previous record of the workmen and any other extenuating or aggravating circumstance at the time of the passing of the order of dismissal. Neetu Magoo (RW-1), who is the Manager, HR has admitted that on 09.10.2018, one hour short leave of the petitioner was deducted as punishment. Moreover, the respondent had not notified to the petitioner or the other workmen anything about his past record in the show cause notice. There is nothing on record to remotely suggest as to what led the disciplinary authority to the imposition of the major or extreme penalty of dismissal. As per Certified Standing Order, apart from dismissal there are other punishments provided even for major misconduct.

35. By now it is fairly well settled that after insertion of section 11-A, it is more than clear that the Labour Court has the jurisdiction and power to substitute its measure of punishment in place of managerial wisdom, provided that the order of dismissal was not justified in the facts and circumstances of the case. In this behalf support can ably be drawn from the Judgment of the Hon'ble Supreme Court titled as **Ramakant Misra Vs. State of UP and others AIR 1982 SC 1552**. The aforesaid ratio has been further re-affirmed by the Hon'ble Supreme Court in **Civil Appeal no. 4436 of 2010 titled as Nicholas Piramal India Ltd. Vs. Hari Singh decided on**

30.4.2015, holding that the “doctrine of proportionality” is to be applied to the facts and situation of each case and if the punishment is disproportionate to the gravity of misconduct it would be appropriate to alter the punishment so imposed. It has been further held that the past conduct of the workman is also required to be notified to the delinquent before the order of dismissal is passed.

36. The facts narrated and discussed hereinabove would clearly demonstrate that not only have the witnesses only partially supported the case of the workman in the enquiry proceedings but even the gravity of the misconduct has not been duly considered by the disciplinary authority while imposing sentence. The factum that the strike had already ensued on 09.10.2018, itself, and the workers were the office bearers of the union did not also weigh with the disciplinary authority, what to say about the past conduct of the petitioner and other workmen. It is thus apparent that the punishment imposed is indeed disproportionate to the misconduct attributed and alleged to the petitioner.

37. While testing the factual back-ground on the principles, set out hereinabove on the touch stones of the merits of the case, it transpires that the respondent had on 2nd March, 2019 vide (RW-1/E), sent written communication to the petitioner seeking comments, if any, on the findings of the enquiry officer. The enquiry report (Rw-2/C), had also been sent along-with. The petitioner had also replied to the same vide (RW-1/F).

38. Looking into the Certified Standing Orders of the respondent company, which has been placed on record, the procedure for disciplinary action has been enunciated in clause 28 which reads as follows:

“28. Procedure for enquiring into complaints:

All complaints arising out of workman’s employment those relating to alleged unfair treatment or wrongful exaction on the part of the employer on his agent or servant, shall be submitted by a workman to the Personal Manager/Authorized Officer of the Industrial Establishment. The officer to whom the complaint has been submitted shall personally investigate the complaint at such time and places as he may fix in within parties provided that the complaints relating to :—

xxi. Assault or abuse by any person holding a supervisory post or

xxii. Refusal of an application for urgent leaves, shall be enquired into without avoidable delay by the investigating officer.

Whether the complainant alleges unfair treatment or exaction on the part of his employer or his agent or servant, a copy of the order finally made shall be supplied to the complainant and employer in case requested is made by either of the parties.

Workman who is aggrieved by punishment awarded, may file an appeal to the officer immediate superior to the officer who passed order and who will give decision in one week from the date of receipt of appeal. This decision be final subject to legal enactments.

Clause 24 of the Standing Orders provide the penalties for misconduct which may be awarded to a workman and the same reads as follow:

- u. Any workman who is adjudged by the employer on examination of the workman, if present, and on the basis of of the facts to be guilty of misconduct, is liable to be summarily dismissed without notice or compensation in lieu of notice.**

v. **The company may at its discretion give an workman the following punishment in lieu of dismissal.**

(i) **The censure or warning or**

(ii) **Suspend him (without pay) for a period not exceeding ten days in case of weekly paid workman and not exceeding 30 days in case of monthly paid workman or**

(iii) **Withhold the increment not more than 2 years or demote him to a low rank.”**

39. The reading of clause 24 shows that it does not provide for a second opportunity to be granted to the delinquent. No requirement has been envisaged in the standing orders to giving the delinquent any opportunity to offer any explanation. In the case in hand the respondent had afforded opportunity to the petitioner to offer comments in respect of the findings recorded by the enquiry officer within five days and the copy of the enquiry report had also been supplied along-with.

40. Keeping in view the ratio laid down by the Having said so, the perusal of the judgment titled as **Associate Cement Company Ltd. Vs. T.C Shrivashva and others 1984 (Supp.) SCC 87**, however shows that unless the certified standing orders provide for a 2nd show cause notice on the proposed punishment is not a condition precedent for imposing punishment. As per the judgment no enquiry which is otherwise fair and valid will be vitiated by non-offering of such second opportunity. Therefore, it is clear that the plain reading of the standing orders read as a whole does not warrant an assumption that second show cause notice had to be issued to the petitioner. It cannot thus be said that the enquiry was even vitiated on this count too.

41. For the foregoing reasons, it is held that the respondent has conducted the domestic enquiry as per the provisions of the Act, and the Standing Orders, it is however held that the punishment imposed by the disciplinary authority is disproportionate to misconduct alleged. The Hon'ble Supreme Court in **Nicholas Piramal's case** referred hereinabove supra, has held, even denial of 50% back-wages is itself a punishment imposed upon the workman. None the less keeping in view the totality of circumstances discussed hereinabove, in such a situation with holding of two increments with cumulative effect will be more than adequate punishment for such an employee. The issues are decided accordingly.

RELIEF

42. As a sequent effect it has already been held while deciding preceding issues 1 & 2 that order of dismissal of the petitioner is not only illegal but also unjustifiable. The respondent management could have awarded any other punishment as prescribed in clause 24 of Certified Standing Order. Henceforth, the dismissal order is hereby set aside and the same is replaced and substituted with punishment of withholding of two increments with cumulative effect. However, in the given facts and circumstance, the petitioner is not entitled to any back-wages. Hence, the respondent management is hereby directed to re-engage/reinstate the petitioner with seniority and continuity but without back-wages by awarding the punishment of stoppage of two increments. It is further directed that the service benefits to the petitioner be given within a period of two months from the date of announcement of award. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File after completion be consigned to records.

43. The reference is answered in the aforesaid terms.

No orders as to cost. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2022.

Sd/-
(RAJESH TOMAR)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

**BEFORE RAJESH TOMAR, CHAIRMAN (PRESIDING JUDGE) H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, HOLDING NATIONAL LOK ADALAT,
SHIMLA ON 27.11.2022**

Reference Number : 118 of 2018
Instituted on : 03-07-2018
Decided on : 27-11-2022

Naresh Kumar s/o Shri Roop Lal r/o c/o HS Negi, Meera Niwas, Navbahar, Shimla-02, H.P.
. *Petitioner.*

VERSUS

The Principal, St. Bedes College, Navbahar, Shimla-02, H.P. . *Respondent.*

Reference under section 10 of the Industrial Disputes Act, 1947

For Petitioner : Shri Hitender Thakur, Advocate
For Respondent : Shri Rajnish K. Lal, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government vide notification dated 07.04.2018, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication:

“Whether termination of services of Shri Naresh Kumar s/o Shri Roop Lal, r/o c/o HS Negi, Meera Niwas, Navbahar, Shimla-02, HP by the Principal, St. Bedes College, Navbahar, Shimla-02, HP w.e.f. 04.07.2017 without complying with the provisions of the Industrial Disputes Act, 1947 as alleged by the workman, is legal and justified? If not, what relief including reinstatement, amount of back-wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer/management?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim praying therein for his reinstatement with all service benefits including back-wages.

3. To the fore, Sister Reena, Manager, of respondent college stated that the dispute interse the parties stood amicably resolved and settled, as a result of which the respondent management

had agreed to make full & final settlement amount or ₹ 60,000/- to the petitioner in lieu of reinstatement, back-wages, seniority, past service benefits and compensation. Nothing survive in the present petition. She also placed on record ID proof (PY) and copy of cheque no. 002734 (PZ) on record. The statement is read over and explained to her. To this effect her statement recorded separately.

4. The petitioner Shri Naresh Kumar, vide his separate statement, has stated that since the matter stood amiably resolved and settled between the parties as the respondent college had agreed to pay a sum of ₹ 60,000/- (Sixty Thousand) as full and final compensation to him in lieu of reinstatement, seniority, continuity and back-wages which is acceptable to him, hence, nothing is due from the respondents and as such he does not want to proceed further with the present reference which may kindly be decided accordingly. The statement of Sister Reena, Manager is read over and explained to him which is duly acceptable.

5. Thus, keeping in view the attendant facts and circumstances of the case vis- a -vis perusal of the case record manifestly and conclusively goes to demonstrates that the Industrial Dispute raised from the side of the late petitioner stood amicably resolved and finally compromised between the parties and the respondent has agreed to pay a sum of ₹ 60,000/- (Sixty Thousand) as full and final settlement amount of the claim. From the aforesaid statements of the parties, it is apparently established that the parties have compromised the industrial dispute arising out of reference no. 118 of 2018.

6. Since, the matter stood amicably resolved and settled between the parties by way of amicable settlement, therefore, nothing survives in the present industrial dispute. **Consequently, the industrial dispute raised by the petitioner stood amicably settled to which the petitioner has been fully & finally compensated. The Respondent company is directed to pay agreed amount i.e. Rs. 60,000/- (Sixty Thousand), which has been paid today in the Court itself before me.**

7. The reference is answered accordingly and the award is passed as per the statements of parties, which shall form the integral part and parcel of this award.

8. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Kumari Sonika
(Member)

Hemlata
(Member)

(Rajesh Tomar)
Chairman,
National Lok Adalat.

Announced : 27-11-2022

**BEFORE SHRI RAJESH TOMAR, CHAIRMAN (PRESIDING JUDGE) H.P.
INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, HOLDING NATIONAL LOK
ADALAT, SHIMLA ON 27.11.2022**

Reference Number : 62 of 2017
Instituted on : 11-04-2017
Decided on : 27-11-2022

STP Contractor Workers Union Shimla through its Secretary, 9 Bawa Building, The Mall Shimla, H.P. . .Petitioner.

VERSUS

1. The Engineer-in-Chief, IPH Department, US Club, Shimla-1, H.P.
2. The Executive Engineer, IPH, Department, Division No.II, Shimla-4, H.P.
3. Shri AkshayDogar, Contractor C/o Executive Engineer, IPH, Department, Division No.II, Shimla-4, H.P. (old contractor).
4. Municipal Corporation Shimla, JHP though its Commissioner, Shimla, H.P.
5. Shimla Jal Prabandhan Nigam Ltd., Shimla HP through its Manging Director-cum-Chief Executive Officer, US Club Shimla, H.P. . .Respondents.

Reference under section 10 of the Industrial Disputes Act, 1947

For Petitioner	:	Shri O.P. Chauhan, Advocate
For RespondentNo. 1& 2	:	Ms. Reena Chauhan, Dy. DA
For Respondent No.3	:	Shri Pawan Gautam, Adv.
For Respondent No.4	:	Sh. Yadvinder Thakur, Adv.
For Respondent No.5	:	Shri Surender Chauhan, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government vide notification dated 20.2.2017, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication:

“Whether demands raised by the President (Sh. Radhey Shyam) and General Secretary (Shri Mohan Singh), STP Contract Workers Union Shimla-9, Bawa Building The mall Shimla-3 vide demand notice dated 01.02.2016 (copy enclosed) for tis fulfilling before the (1) the Employer/Engineer-in-Chief, I&PH Department US Club, Shimla-1 and (2) Shri Akshay Dogar, Contractor C/o Executive Engineer, IPGH Department, Division No.II, Shimla-4, are legal and justified? If yes, what relief of service benefits the aggrieved workmen are entitled to from the above employer?”

2. On receipt of the said reference from the appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner (STP Workers Union) has filed the statement of claim praying therein for the fulfilment of the demands of workers raised vide demand notice dated 1.2.2016.

3. To the fore, Shri Gopal Krishan Additional General Manager (Sewerage) SJPNL Shimla has stated at bar that the demands raised by STP Contractor Workers Union vide demand notice dated 01.02.2016, vide which the petitioner union had raised various demands, received by way of reference in this Court vide notification dated 20.2.2018 from the appropriate government. He further stated that the most of the demands of the petitioner union stood amicably resolved and settled as per status report Ex. PX. However, the demand of the petitioner union regarding the

regularization of their services shall be dealt with accordingly, as per the terms and conditions of the regulation of the Policy, issued in this regard from time to time by the State Government. He also tendered in evidence copy of his Aadhar Card Ex. PW. To this effect his statement recorded separately.

4. Shri Dalip Singh, General Secretary of the STP Contractor Workers union vide his separate statement has stated that vide demand notice dated 01.02.2016, they have raised as many as fifteen demands, out of which most of the demands were settled by the respondent vide status report Ex. PX and he being the General Secretary of the Workers Union is duly authorized to resolve and settle the dispute by way of amicable settlement vide authority letter Ex. PY. He places on record his identity card Ex. PZ. He deposed that the aforesaid statement made by Shri Gopal Krishan Additional General Manager (Sewerage) SJPNL is acceptable to him.

5. Thus, keeping in view the attendant facts and circumstances of the case vis- a –vis perusal of the case record manifestly and conclusively goes to demonstrates that the Industrial Dispute raised from the side of the STP Contractor Workers Union stood amicably resolved and finally compromised between the parties and the respondent has agreed to resolve the demand of the petitioner union regarding the regularization of their services as per the terms and conditions of the regulation of the Policy, issued in this regard from time to time by the State Government. From the aforesaid statements of the parties, it is apparently established that the parties have compromised the industrial dispute arising out of reference no. 62 of 2017.

6. Since, the matter stood amicably resolved and settled between the parties by way of amicable settlement, therefore, nothing survives in the present industrial dispute. **Consequently, the industrial dispute raised by STP Workers Union stood amicably settled to which the respondent has agreed** to resolve the demand of the petitioner union regarding the regularization of their services as per the terms and conditions of the regulation of the Policy, issued in this regard from time to time by the State Government.

7. The reference is answered accordingly and the award is passed as per the statements of parties, status report (PX), authority letter (PY), Identity proof (PZ) and aadhar card (PW), which shall form the integral part and parcel of this award.

8. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Kumari Sonika
(Member)

Hemlata
(Member)

(Rajesh Tomar)
Chairman,
National Lok Adalat.

Announced : 27-11-2022

**BEFORE SHRI RAJESH TOMAR, CHAIRMAN (PRESIDING JUDGE) H.P.
INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, HOLDING NATIONAL LOK
ADALAT, SHIMLA ON 27.11.2022**

Reference Number : 164 of 2018

Instituted on : 06-09-2018

Decided on : 27-11-2022

STP Contractor Workers Union Shimla through its Secretary, 9 Bawa Building, The Mall Shimla, H.P. . *Petitioner.*

VERSUS

6. The Commissioner, MC Shimla-1.
7. The Executive Engineer, IPH, Department, Division No.II, ISBT Tutikandi, Shimla, H.P.
8. Shri Tek Chand Thakur, Contractor, r/o Chandra Villa, Thakur Bag Anadale, Shimla H. P. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947

For Petitioner	:	Shri O.P. Chauhan, Advocate
For Respondent No.1	:	Shri Surender Chauhan, Adv.
For Respondent No.2	:	Ms. Reena Chauhan, Dy. DA
For Respondent No.3	:	Shri Jagat Singh Shyam, Adv.

AWARD

The following reference petition has been, received from the Appropriate Government vide notification dated 04.05.2018, under section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act), for its legal adjudication:

“Whether demands raised STP Contract Workers Union Shimla-9, Bawa Building The Mall Shimla-3 before the Mayor Municipal Corporation Shimla vide demand notice dated 21.09.2016 (copy enclosed) to be fulfilled by (I) the Commissioner, MC Shimla, Shimla-1 (II) The Executive Engineer, IP&H Department, ISBT Tutikandi, Shimla- and III) Shri Tek Chand Thakur, Contractor, r/o Chandra Villa, Thakur Bag Anadale, Shimla HP (contractor), are legal and justified? If yes, what relief of service benefits the aggrieved workmen are entitled to from the above employers in terms of demand notice dated 21.09.2016?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner (STP Workers Union) has filed the statement of claim praying therein for the fulfilment of the demands of workers raised vide demand notice dated 21.09.2016.

3. To the fore, Shri Gopal Krishan Additional General Manager (Sewerage) SJPNL Shimla has stated at bar that the demands raised by STP Contractor Workers Union vide demand notice dated 21.09.2016, vide which the petitioner union had raised various demands, received by way of reference in this Court vide notification dated 04.05.2018, from the appropriate government. He further stated that the most of the demands of the petitioner union stood amicably resolved and settled as per status report Ex. PX. However, the demand of the petitioner union regarding the regularization of their services shall be dealt with accordingly, as per the terms and conditions of the regulation of the Policy, issued in this regard from time to time by the State Government. He also tendered in evidence copy of his Aadhar Card Ex. PW. To this effect his statement recorded separately.

4. Shri Dalip Singh, General Secretary of the STP Contractor Workers union vide his separate statement has stated that vide demand notice dated 21.09.2016, they have raised as many as fifteen demands, out of which most of the demands were settled by the respondent vide status report Ex. PX and he being the General Secretary of the Workers Union is duly authorized to resolve and settle the dispute by way of amicable settlement vide authority letter Ex. PY. He places on record his identity card Ex. PZ. He deposed that the aforesaid statement made by Shri Gopal Krishan Additional General Manager (Sewerage) SJPNL is acceptable to him.

5. Thus, keeping in view the attendant facts and circumstances of the case *vis- a-vis* perusal of the case record manifestly and conclusively goes to demonstrates that the Industrial Dispute raised from the side of the STP Contractor Workers Union stood amicably resolved and finally compromised between the parties and the respondent has agreed to resolve the demand of the petitioner union regarding the regularization of their services as per the terms and conditions of the regulation of the Policy, issued in this regard from time to time by the State Government. From the aforesaid statements of the parties, it is apparently established that the parties have compromised the industrial dispute arising out of reference no. 164 of 2018.

6. Since, the matter stood amicably resolved and settled between the parties by way of amicable settlement, therefore, nothing survives in the present industrial dispute. **Consequently, the industrial dispute raised by STP Workers Union stood amicably settled to which the respondent has agreed** to resolve the demand of the petitioner union regarding the regularization of their services as per the terms and conditions of the regulation of the Policy, issued in this regard from time to time by the State Government.

7. The reference is answered accordingly and the award is passed as per the statements of parties, status report (PX), authority letter (PY), Identity proof (PZ) and aadhar card (PW), which shall form the integral part and parcel of this award.

8. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Kumari Sonika
(Member)

Hemlata
(Member)

(Rajesh Tomar)
Chairman,
National LokAdalat.

Announced:
27.11.2022

